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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 230.

GEORGE D. HULING AND LUCY E. HULING, PLAINTIFFS IN ERROR,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

FILED MARCH 11, 1886.

SUPREME COURT OF THE UNITED STATES.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, SEPTEMBER 19, 1888.

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1 In the Circuit Court of the United States for the District of Kansas. June Term, 1883.

GEORGE D. HULING and LUCY E. HULING, Plaintiffs,
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendants. } 4208.

Plaintiffs, for their cause of action against defendant, allege that they are citizens of the State of Missouri, and that defendant is a corporation organized and existing under and by virtue of the laws of the State of Kansas, and a resident of said State.

That plaintiffs are the owners in fee simple of the south half ($\frac{1}{2}$) of the following-described tract of land, to wit, and were the owners of same at the time of the grievance hereinafter mentioned: Commencing at a point on the State line between the State of Missouri and Kansas, five hundred and two (502) feet south of the southwest corner of the northwest quarter of section seven (7), in t'w'p — (49), range 33, in Missouri, thence south five hundred and four (504) feet to a stake; thence west nine hundred ninety-five (995) feet to a stake on the east bank of the Kansas river; thence south twenty-six (26°) degrees east five hundred sixty-five feet (565) to a stake; thence east seven hundred thirty-five (735) feet to the place of beginning, all lying and situated in the county of Wyandotte, State of Kansas.

That said railway company did on or about the first day of Sept., 1882, unlawfully and without right enter upon, take possession of, convert, and appropriate to its use a strip of said land as above described, said strip being described as follows, to wit:

2 A strip of land twenty-five feet wide in the N. W. fr. $\frac{1}{4}$ of sec. 23, t'w'p 11, range 25, Wyandotte county, Kansas, lying between two lines which extend from the line between the States of Missouri and Kansas to the east bank of the Kansas river. The centre line between the said boundary lines begins at a point on said State line $890\frac{5}{10}$ ft. south of the southwest corner of the northwest $\frac{1}{4}$ of sec. 7, tow'p 49, R. 33, Jackson county, Missouri, and runs on a curve of which the radius is $603\frac{5}{10}$ ft. for a distance of $402\frac{1}{10}$ ft., deflecting to the right from a tangent which bears S. 56° 24′ W. at said point of beginning; thence running $79\frac{5}{10}$ ft. on a tangent bearing N. 82° 24′ W.; thence deflecting to the right and running $321\frac{1}{10}$ ft. on a curve of which a radius is $644\frac{1}{10}$ ft.; thence on a tangent bearing 56° 49′ west to the east bank of the Kansas river, containing forty-six ($\frac{46}{100}$) one-hundredths of an acre. Thus said railway company has fenced off said strip, constructed said track upon the same, and is now using said land for operating its cars and rolling stock.

That the value of said strip of land, so unlawfully taken, converted, appropriated, and used by the defendant, is the sum of three thousand dollars, no part of which sum has been paid plaintiffs; that plaintiffs' remaining land and lots from which said strip was taken

are lessened in value and greatly damaged by reason of said taking, appropriation, and using of said strip; that the house and improvements and growing crops on said premises are damaged and injured by reason hereof.

That for a further assurance plaintiffs say that upon the payment of the damages assessed in this action for the taking, appropri-
3 ation, and conversion of said land they will execute and deliver to said defendant a deed to said strip, conveying all their rights, title, and interest to the same.

Wherefore plaintiffs pray judgment in the sum of ten thousand dollars and their costs.

ALDERSON & YOUNG AND
BYRON SHERRY, *Plaintiffs' Att'ys.*

Endorsed: No. 4208. George D. Haling *et al. vs.* The Kaw Valley Railway and Improvement Co. Petition. Filed April 30, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Alderson & Young and Byron Sherry, for pl'f't's.

4 CIRCUIT COURT OF THE UNITED STATES OF AMERICA, } ss:
District of Kansas, }

The United States of America to the marshal of the district of Kansas, Greeting:

You are hereby commanded to notify the Kaw Valley Railway and Improvement Company that it has been sued by George D. Huling and Lucy E. Huling in the circuit court of the United States for the district of Kansas, and that unless it answer by the 30th day of May, A. D. 1883, the petition of the said George D. Huling and Lucy E. Huling against it, filed in the clerk's office of the said court, such petition will be taken as true, and judgment rendered accordingly. You will make due return of this writ on the 10th day of May, A. D. 1883.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, at Topeka, in said district, this 30th day of April, A. D. 1883.

[SEAL.] A. S. THOMAS, *Clerk,*
By FRANK J. THOMAS, *Deputy.*

5 [Endorsed:] No. 4208. Circuit court of the United States, district of Kansas. George D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Co. Summons. Issued April 30, 1883. Returnable May 10, 1883. Filed May 8, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Alderson & Young, attorneys for plaintiffs.

Suit brought for the recovery of money. Amount claimed, $10,000 and their costs.

ALDERSON & YOUNG AND
BYRON SHERRY,
Attorneys for Plaintiffs.

U. S. Marshal's Return.

DISTRICT OF KANSAS, *ss:*

Received the within writ April the 30th, 1883. Served the same, at the county of Wyandotte, State and district of Kansas, on the 4th day of May, 1883, by delivering personally to Charles F. Morse, general manager of the within-named defendant, The Kaw Valley Railway and Improvement Company, and at his office, a true and certified copy of this writ, with all the endorsements thereon, being unable to find the president or other officer of said company in my State and district of Kansas, and at the time and place of service of this writ I delivered a true copy of plaintiffs' petition in this cause of action to the said Charles F. Morse, general manager of the within-named defendant, The Kaw Valley Railway and Improvement Company.

B. F. SIMPSON,
U. S. Marshal,
By S. P. WADE, *Deputy.*

Service	4 00
Hotel	3 50
Service	2 00
	$9 50
Service petition	2 00
	$11 50

6 *Precipe.*

GEORGE D. HULING & LUCY E. HULING, Pl't'ffs,
vs.
THE KAW VALLEY RAILWAY & IMPROVEMENT CO., Def't.

LAW OFFICE ALDERSON & YOUNG,
521 MAIN STREET, KANSAS CITY, MO., *May 1st*, 1883.

To the clerk of the circuit court of the district of Kansas:

You are hereby directed to issue a summons to the defendant in the above-entitled cause, returnable at the next term of your court. Service to be had on Chas. F. Morse, general manager, office at Stock Exchange.

ALDERSON & YOUNG,
Att'ys for Pl't'ffs.

Endorsed: No. 4208. Geo. D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Co. Prec. for sum's. Filed May 2, 1883. A. S. Thomas, clerk.

In the Circuit Court of the United States for the District of Kansas.

GEORGE D. HULING & LUCY E. HULING, Pl'ffs,
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Def't.

We enter our security for costs in said case and promise to pay all costs which may accrue to the opposite party in this action or to any of the officers of this court; and in default of payment by the plaintiffs of any costs ordered or adjudged to be paid by them we hereby agree and stipulate that execution may issue against our property for any costs taxed against plaintiffs.

7 Dated this 1st day of May, 1883.

G. D. HULING.
ALBERT YOUNG.
N. A. ALDERSON.

Endorsed: No. 4208. Geo. D. Huling *et al. vs.* The Kaw Valley Railway & Improvement Co. Sec. for costs. Filed May 2, 1883. A. S. Thomas, clerk. Approved May 2, 1883. A. S. Thomas, clerk.

8 *Answer.*

In the Circuit Court of the United States for the District of Kansas.

GEORGE D. HULING *et al.*, Plaintiffs,
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendants.

1st. The said defendant, for answer to the petition of the above-named plaintiffs, filed herein, denies the same and each and every allegation therein contained, except the allegation of its incorporation.

2nd. And for a second and further answer to said petition said defendant admits that it is and was, at the several times hereinafter mentioned, a corporation, duly created and existing under and by virtue of the laws of the State of Kansas, and avers that among the purposes for which it was created was the construction, maintenance, and operation of a railroad through the county of Wyandotte, in the State of Kansas.

That on or about the 18th day of April, 1882, in pursuance of the statute of the State of Kansas in such case made and provided, defendant made an application in writing to Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, State of Kansas, in the words and figures following, to wit:

To Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, Kansas:

Your petitioner, the Kaw Valley Railway and Improvement Company, respectfully represents that it is a corporation duly created and existing under and by virtue of the laws of the State of Kansas

and, as authorized by the laws of said State and its charter, proposes to construct its railroad through said county of Wyandotte.

9 And your petitioner hereby makes this its application in writing for the appointment by your honor of three commissioners, freeholders and residents of said county, to lay off along the line of the proposed railroad of your petitioner, as located by it through section twenty-three (23), in township eleven (11), range twenty-five (25), a route for such proposed railroad, twenty-five feet wide, as desired by said company.

That such commissioners may be directed to forthwith proceed to lay off such route as aforesaid.

That they may be directed to have the same carefully surveyed and ascertain the quantity of land necessary to be taken for such purpose out of each quarter section through which such road is located and appraise the value thereof and assess the damages thereto; and that if such commissioners shall ascertain that such portion of such quarter section belongs to different owners they appraise the value and assess the damage of each such owner's interest.

KAW VALLEY RAILWAY AND
IMPROVEMENT CO.,
By PRATT, BRUMBACK & FERREY,
Its Att'ys.

That thereupon, on said 18th day of April, 1882, said judge, upon said application in writing, under his hand, appointed N. McAlpine, W. H. Ryus, and L. H. Wood, three freeholders, residents of said Wyandotte county, commissioners for the purpose in said petition specified; which said appointment is in the words and figures following, to wit:

Before Hon. W. R. Wagstaff, judge of the district court of Wyandotte county.

In the Matter of the Application of THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY for the Appointment of Commissioners to Condemn Land.

10 On reading and filing the application in writing of The Kaw Valley Railway and Improvement Company, a corporation duly created and existing under and by virtue of the laws of the State of Kansas, whereby it appears that said company proposes to construct its railroad through section twenty-three (23), in township eleven (11), range twenty-five (25), in said county of Wyandotte, and praying for the appointment of three commissioners, freeholders, and residents of said county, to lay off along the line of such proposed road, as located through said section, a route for such proposed railroad twenty-five feet in width, as desired by said company:

It is hereby ordered that N. McAlpine, W. H. Ryus, L. H. Wood, three freeholders and residents of Wyandotte county, be, and they are hereby, appointed three commissioners for the purpose aforesaid, and said commissioners are hereby directed to proceed forthwith to

lay off such route through said section twenty-three (23) and of the width aforesaid, as desired by said company.

That said commissioners have the same carefully surveyed and ascertain carefully the quantity of land necessary for such route out of each quarter section through which such road is located, and appraise the value thereof and assess the damages thereto, and that if said commissioners shall ascertain that such portion of such quarter section belongs to different owners they appraise the value and assess the damages of each such owner's interest, and that they make and file a report of their doings in the premises persuant to the statute in such case made and provided.

W. R. WAGSTAFF,
Dist. Judge.

That said petition and order of appointment were on the
11 same day duly recorded in the office of the register of deeds for said Wyandotte county.

That on the 19th day of April, 1882, said commissioners were duly sworn to faithfully discharge their duties as such commissioners.

That on the 20th day of April, 1882, said commis- caused a notice of the time when they would proceed to lay off a route for said railroad through said section twenty-three (23), in township eleven (11), range twenty-five (25), and appraise the value and assess the damages to each quarter section through and over which said railroad might be located, to be published in the Wyandotte Herald, a newspaper printed and published weekly in said county of Wyandotte, and of general circulation therein, and the same to be published weekly thereafter in each issue of said paper up to the 22nd day of May, 1882; which said notice is in the words and figures following, to wit:

"*Railroad Notice.*

To all persons owning lands on the line of the railroad of the Kaw Valley Railway and Improvement Company as the same is now or may be located through section twenty-three (23), in township eleven (11), of range twenty-five (25), in the county of Wyandotte and State of Kansas:

You are hereby notified that the undersigned commissioners, duly appointed by Hon. W. R. Wagstaff, judge of the district court of said county, upon the application in writing of said company for that purpose, will on Monday, May 22nd, 1882, proceed to lay off a route for said railroad through said section and appraise the value of and assess the damages to each quarter section through and over which said railroad is or may be located.

N. McALPINE,
W. H. RYUS,
L. H. WOOD,
Commissioners."

12 That on said 22ond day of May, 1882, said commissioners, in pursuance of said order of appointment and said notice, proceeded to lay off a route for the railroad of said defendant through said section twenty-three (23), township eleven (11), range twenty-five (25), in said county of Wyandotte, and upon the line of which said railroad was located, and appraised the value of the portion so laid off and assessed the damages thereto, and thereupon made and signed a written report of their doings in the premises; which said report, except the exhibits thereto attached, is in the words and figures following, to wit:

"Before Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, Kansas.

In the Matter of the Application of THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY for the Appointment of Commissioners to Condemn Lands in Wyandotte County.

The undersigned, commissioners, duly appointed in the above matter by Hon. W. R. Wagstaff, judge of the district court of said Wyandotte county, by an order made herein on the 18th day of April, 1882, which is filed herewith, marked Exhibit A, do hereby, in pursuance of the terms and provisions thereof, make and file this our report of our doings in the premises:

That we took the oath provided by law to faithfully and honestly discharge our duties, which is hereto attached and made a part hereof, and is marked Exhibit B.

That we gave notice that we would, on the 22nd day of May, 1882, proceed to lay of- the route of said railroad through section twenty-three (23), of township eleven (11), of range twenty-five (25), in said county of Wyandotte and State of Kansas, and appraise the
13 value of and assess the damages to each quarter section through and over which said railroad is or may be located, which said notice was given by publication in the Wyandotte Herald, a newspaper published and of general circulation in said Wyandotte county, more than thirty days before the time so fixed, the first publication of which was on the 20th day of April, 1882, and was published in said paper each week up to the time so fixed, a copy of which notice, with proof of due publication thereof, is hereto attached and made a part hereof and marked Exhibit C.

That, in pursuance of said order and notice, we did, on the 22nd day of May, 1882, proceed to lay off such route through said section over and upon the line on which the said railroad is located; that we had a strip of land twenty-five (25) feet in width, as desired by said railroad company, over and across the northwest quarter of said section twenty-three (23) for its right of way carefully surveyed, and ascertained carefully the quantity of land necessary for such purpose out of such quarter section through which said route is located, and appraised the value of such portion of such quarter section, which is described as follows:

A strip of land twenty-five (25) feet wide in the N. W. fr. ¼ of section twenty-three, T. 11, R. 25, Wyandotte county, Kansas,

lying between two lines which extend from the line between the States of Missouri and Kansas to the east bank of the Kansas river. The center line between the said boundary lines begins at a point on said State line 890 8/10 feet south of the southwest corner of the northwest ¼ of section 7, T. 49, R. 33, Jackson county, Missouri, and runs on a curve, of which the radius is 603 8/10 feet, for a distance of 402 1/10 feet, deflecting to the right
14 from a tangent which bears south 56 degrees 24 minutes west at said point of beginning; thence running 79.9 feet on a tangent bearing N. 85 degrees 24 minutes W.; thence deflecting to the right and running 321.2 feet on a curve, of which the radius is 644.2 feet; thence on a tangent bearing N. 56 degrees 49 minutes west to the east bank of the Kansas river, containing 4.6/10 of an acre, and which is the quantity of land required by said company out of said quarter section, at $725.00, and assessed no damages to said land out of which the same is taken, thus making a total of $725.00; that said land belongs to the heirs of A. B. Huling, who are entitled to said $725.00; that upon the tracing, which is hereto attached, made a part hereof, and marked Exhibit 'D,' the center line of said railroad is marked in red.

L. H. WOOD.
N. McALPINE.
W. H. RYUS."

That thereupon and on the 6th day of June, 1882, said commissioners filed said report, with the exhibits thereto attached, in the office of the county clerk of said Wyandotte county.

That said county clerk thereupon made a copy of said report, and on the 8th day of June, 1882, filed the same in the office of the treasurer of said county of Wyandotte.

That thereupon, after said filing, and on the same day the defendant caused to be paid to said county treasurer the sum of $725.00, which was the full amount of such appraisement so made by said commissioners.

That thereupon and on the same day said county treasurer endorsed upon said copy of said report so filed with him a certificate of said payment under his hand and seal of office.

That thereupon and on the same day the defendant caused such copy of said report, with the certificate of the county treas-
15 urer thereon, to be filed and recorded in the office of the register of deed- for the said county of Wyandotte.

That thereupon and thereafter said defendant took possession of the property so as aforesaid condemned and constructed upon it a railroad, and has ever since been in actual possession of and operating the same.

That the land so acquired by this defendant by virtue of the condemnation proceedings above set forth is the same land described in the petition herein as unlawfully entered upon and taken by defendant.

And this defendant denies each and every allegation of said petition not hereinbefore in this second defense specifically admitted.

Wherefore defendant prays to be dismissed with its costs.

PRATT, BRUMBACK & FERREY,
Att'ys for Def't.

Endorsed: No. 4208. U. S. circuit court, district of Kansas. George D. Huling *et al. vs.* Kaw Valley Railway and Improvement Co. Answer. Filed May 31, 1883. A. S. Thomas, clerk. Filed June 15, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

16 In the Circuit Court of the District of Kansas. June Term, 1883.

GEORGE D. HULING *et al.*, Pl'ff's,
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Def't.

Plaintiffs, for their demurrer to the second count or defense in defendant's answer herein, say—

1st. That said district court of Wyandotte county, Kansas, or said board of commissioners or commissioners never acquired jurisdiction over the owners of the land, the plaintiffs herein, or said land described for the reason that said alleged notice in said alleged proceedings is not such as is required by law in such cases.

2nd. That said second defence in said answer does not state facts sufficient to constitute a defence to this action.

ALDERSON & YOUNG &
BYRON SHERRY, *For Pl'ffs.*

Endorsed: # 4208. George D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Co. Demurrer to answer. Filed June 4, 1883. A. S. Thomas, clerk. Alderson & Young & B. Sherry.

UNITED STATES OF AMERICA, } *ss:*
District of Kansas, }

At term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Leavenworth, in said district, on Monday, fourth day of June, 1883, proceedings were had and appear of record in words and figures following, to wit:

17 GEORGE D. HULING *et al.*
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY. } 4208.

WEDNESDAY, *June* 6, 1883.

The demurrer of the plaintiffs to the second defense of the answer of the defendant filed herein coming on for hearing was argued by counsel, and upon consideration thereof the same was overruled; and thereupon the plaintiffs ask leave to amend their petition by alleging that they were the owners of the property described in said

petition at the time the alleged grievances were committed, which is granted, and plaintiffs allowed to amend by interlineation of the original petition, and the defendants have ten days with which, to file their answer to said amended petition and the plaintiffs ten days thereafter to file reply thereto, and cause is continued.

Pratt, Brumback and Ferry, attorneys & counselors-at-law.

KANSAS CITY, MO., *June* 15, 1883.

A. S. Thomas, Esq., clerk U. S. cir. court, Leavenworth:

DEAR SIR: On the 6th inst. the pl'ff in case of Huling *vs.* Kaw Valley Railway & Improvement Co. (No. 4208) took leave to amend his petition by interlineation and we had ten days to answer, which time expires to-morrow. Please refile the original answer as an answer to the amended petition and let us know that it is done. Please send us at once statement of costs in the case of Beal *vs.* Anderson County, and oblige.

Yours truly, PRATT, BRUMBACK & FERRY.

Endorsed: No. 4208. Geo. D. Huling *et al. vs.* Kaw Valley Railway and Improvement Co. Pratt, Brumback & Ferry. Precipe to refile answer. Filed June 15, 1883. A. S. Thomas, clerk.

18 In the Circuit Court of the United States for the District of Kansas.

GEORGE D. HULING *et al.*, Pl't'ffs,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Def't.

Plaintiffs, for reply to defendant's answer herein, deny each and every allegation therein contained, except hereinafter admitted.

2nd. Plaintiffs, further answering, say that said alleged condemnation proceedings and judgment of the district court of Wyandotte county, Kansas, and of the alleged commissioners appointed by said court, and each and all of their said acts and doings, set up as a defence in defendant's second defence herein, are illegal and invalid and constitute no defence to this action for the reason that L. H. Wood, one of said alleged commissioners in said proceedings, was not at said time of his alleged appointment or during the alleged proceedings of said commissioners a freeholder and resident of said Wyandotte county, Kansas, through which said railroad was to be laid off and is now constructed.

ALDERSON & YOUNG & BYRON SHERRY,
Att'ys for Pl't'ffs.

Endorsed: 4208. George D. Huling *et al. vs.* Kaw Valley Railway and Improvement Company. Reply. We consent that the within reply may be filed. Pratt, Brumback & Ferry. Oct. 23. 1883. Filed Oct. 23, 1883. A. S. Thomas, clerk, by Frank J, Thomas, deputy. Alderson & Young & Byron Sherry.

19 In the Circuit Court of the District of Kansas. Nov. Term, 1883.

GEORGE D. HULING *et al.*
vs.
THE KAW VALLEY RAILWAY & IMPROVEMENT COMPANY.

It is hereby agreed by and between the parties in the above cause that the same be continued to the next term of said court.

ALDERSON & YOUNG,
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Endorsed: No. 4208. George D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Company. Stipulation for continuance. Filed Dec. 3, 1883. A. S. Thomas, clerk.

UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 26th day of November, 1883, proceedings were had and appear of record in words and figures following, to wit:

GEORGE D. HULING *et al.*
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY. } 4208.

MONDAY, *Dec.* 3, 1883.

Continued per stipulation.

20 *Reply.*

In the United States Circuit Court for the District of Kansas. June Term, 1884.

GEORGE D. HULING and LUCY E. HULING, Plaintiffs,
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT CO., Defendant.

Now come plaintiffs and for reply to defendant's answer herein deny each and every allegation therein contained.

2nd. Plaintiffs, further answering, say that said alleged condemnation proceedings and all the acts, judgments, and proceedings of the district court of Wyandotte county, Kansas, and of the alleged commissioner- appointed by said court, and each and all of their said acts and proceedings as set up in defendant's second defense of its answer herein, are illegal and invalid and constitute no defense to this action for the reason that L. H. Wood, one of the said alleged commissioners in said proceedings set out, was not at said time of his appointment or thereafter a freeholder and resident of said Wyandotte county, Kansas, through which said road was to be laid

off, in that he was not the owner or possessed of the legal title to any real estate in said Wyandotte county or any other county of said State, as required by law.

3rd. That plaintiffs at all the times of said alleged proceedings and ever since have been residents and citizens of the State of Missouri; that they never had any knowledge or information of said alleged proceedings and were not present at the same, nor ever authorized any one to appear for them, or ever in any manner consented to such proceedings; that all of said alleged acts
21 and things were done against their will.

ALDERSON & YOUNG &
BYRON SHERRY,
Att'ys for Pl'ffs.

Endorsed: 4208. G. D. Huling *et al. vs.* The Kaw Valley R'y and Improvement Co. Amended reply. This amended reply may be filed. Pratt, Brumback & Ferry, att'ys for def'ts. Filed May 22, 1884. A. S. Thomas, clerk. Alderson and Young and Byron Sherry, for pl'ffs.

In the U. S. Circuit Court of the State of Kansas. Nov. Term, 1884.

GEORGE D. HULING *et al.*
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY.

We hereby waive a trial by jury in the above cause and consent that the same may be tried by the court.

ALDERSON & YOUNG,
Att'ys for Pl't'ffs.
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Endorsed: No. 4208. In the U. S. circuit c't for district of Kansas. George D. Huling *et al. vs.* The Kaw Valley R'w'y & Improvement Co. Stipulation waiving jury. Filed Nov. 29, 1884. A. S. Thomas, clerk.

In the U. S. Circuit Court in and for the District of Kansas.

G. D. HULING *et al.*
vs.
THE KAW VALLEY R'Y & IMPROVEMENT CO.

22 We hereby agree that the above cause may be set down for hearing on some day during the adjourned term of the U. S. cir. c't in January or February.

Dec. 1, 1884.

ALDERSON & YOUNG,
Att'ys for Pl't'ffs.
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Endorsed: 4208. U. S. circuit court, district of Kansas. George D. Huling *et al. vs.* Kaw Valley Railway & Improvement Co. Stipulation to continue to adjourned term. Filed Dec. 5, 1884. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

UNITED STATES OF AMERICA, *District of Kansas*, } ss:

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, 1884, proceedings were had and appear of record in words and figures following, to wit:

GEORGE D. HULING and LUCY E. HULING
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY. } 4208.

TUESDAY, *January* 6, 1885.

Now comes the plaintiffs herein, by Alderman and Young, their attorneys, and also comes defendant, by Pratt, Brumback and Ferry, its attorney-, and thereupon this action came on for trial, and the parties hereto, by their attorneys, waive a jury herein by written stipulation filed, and submit the premises to the court; and thereupon the court, having heard the evidence adduced and arguments of counsel, now find for the defendant; and thereupon it is by the court here considered, ordered, and adjudged that The said Kaw Valley Railway and Improvement Company, defendant herein, go hence without day and have and recover of George D. Huling and Lucy E. Huling, plaintiffs herein, its costs in this action expended, and that execution issue therefor, and on motion of said plaintiffs it is ordered that they have 30 days from this time in which to prepare bill of exceptions.

23

GEORGE D. HULING and LUCY E. HULING, Plaintiffs,
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendant. } 4208.

TUESDAY, *February* 17, 1885.

Now come said plaintiffs and present their bill of exceptions taken on the trial of this cause, and the same is allowed and signed and ordered to be placed on file with the pleadings and made a part of the record in this cause.

24 In the Circuit Court of the United States for the Dist. of Kansas. Nov. Term, 1884.

GEORGE D. HULING AND LUCY E. HULING

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY.

Be it remembered that in the progress and trial of this cause the following proceedings were had, to wit:

On the 30th day of April, 1883, plaintiffs filed their petition; which is in words and figures as follows:

Petition.

In the Circuit Court of the United States for the District of Kansas. June Term, 1883.

GEORGE D. HULING and LUCY E. HULING, Plaintiffs,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendant.

Plaintiffs, for their cause of action against defendant, allege that they are citizens of the State of Missouri, and that defendant is a corporation organized and existing under and by virtue of the laws of the State of Kansas and a resident of said State.

That plaintiffs are the owners in fee simple of the south half ($\frac{1}{2}$) of the following-described tract of land, to wit, and were the owners of same at the time of the grievance hereinafter mentioned:

Commencing at a point on the State line between the States of Missouri and Kansas five hundred an- two (502) feet south of the southwest corner of the northwest quarter of section seven (7), in twp. 49, range 33, in Missouri, thence south five hundred and four (504) feet to a stake; thence west nine hundred ninety-five (995) feet to a stake on the east bank of the Kansas river; thence
25 north twenty-six (26°) degrees east, five hundred sixty-five feet (565) to a stake; thence east seven hundred thirty-five (735) feet to the place of beginning; all lying and situated in the county of Wyandotte, State of Kansas.

That said railway company did on or about the first day of September, 1882, unlawfully and without right enter upon, take possession of, convert, and appropriate to its use a strip of said land as above described, said strip being described as follows, to wit:

A strip of land twenty-five feet wide in the N. W. qr. ($\frac{1}{4}$) of sec. 23, twp. 11, range 25, Wyandotte county, Kansas, lying between two lines which extend from the line between the States of Missouri and Kansas to the east bank of the Kansas river.. The center line between the said boundary lines begins at a point on said State line $890\frac{8}{10}$ feet south of the southwest corner of the northwest $\frac{1}{4}$ of sec. 7, twp. 49, R. 33, Jackson county, Missouri, and runs on a curve of which the radius is $603\frac{8}{10}$ ft. for a distance of $402\frac{1}{10}$ ft., deflect-

ing to the right from a tangent which bears S. 56° 24′ W. at said point of beginning; thence running 79 1/10 ft. on a tangent bearing N. 85° 24′ W.; thence deflecting to the right and running 321 1/10 ft. on a curve of which a radius is 644 1/10 ft.; thence on a tangent bearing 56° 49′ W. to the east bank of the Kansas river, containing forty-six (46/100) one-hundredths of an acre; that said railway company has fenced off said strip, constructed its track upon the same, and is now using said land for operating its cars and rolling stock.

That the value of said strip of land so unlawfully taken, converted, appropriated, and used by the defendant is the sum of three thousand dollars, no part of which sum has been paid plaintiffs.

26 That plaintiffs' remaining land and lots from which said strip was taken are lessened in value and greatly damaged by reason of said taking, appropriation, and using of said strip.

That the house and improvements and growing crops on said premises are damaged and injured by reason hereof.

Plaintiffs say that, upon the payment of the damages assessed in this action for the taking, appropriation, and conversion of said land, they will execute and deliver to said defendant a deed to said strip conveying all their right, title, and interest to the same.

Wherefore plaintiffs pray judgment in the sum of ten thousand dollars and their costs.

ALDERSON & YOUNG AND
BYRON SHERRY,
Plaintiffs' Att'ys.

Endorsed: No. 4208. George D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Company. Petition. Filed April 30, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Alderson & Young & Byron Sherry, for pl't'ffs.

And on the 1st day of May, 1883, and at the return term of the writ in this case, the defendant filed its answer as follows:

Answer.

In the Circuit Court of the United States for the District of Kansas.

GEORGE D. HULING *et al.*, Plaintiffs,
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendant.

1.

The said defendant, for answer to the petition of the above-named plaintiffs filed herein, denies the same and each and every
27 allegation therein contained, except the allegation of its incorporation.

2.

And for a second and further answer to said petition said defendant admits that it is and was at the several times hereinafter men-

tioned a corporation, duly created and existing under and by virtue of the laws of the State of Kansas, and avers that among the purposes for which it was created was the construction, maintenance, and operation of a railroad through the county of Wyandotte, in the State of Kansas.

That on or about the 18th day of April, 1882, in pursuance of the statute of the State of Kansas in such case made and provided, defendant made an application in writing to Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, State of Kansas, in the words and figures following, to wit:

To Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, Kansas:

Your petitioner, The Kaw Valley Railway and Improvement Company, respectfully represents that it is a corporation duly created and existing under and by virtue of the laws of the State of Kansas, and, as authorized by the laws of said State and its charter, proposes to construct its railroad through said county of Wyondotte.

And your petitioner hereby makes this its application in writing for the appointment by your honor of three commissioners, freeholders and residents of said county, to lay off along the line of the proposed railroad of your petitioner as located by it through section twenty-three (23), in township eleven (11), range twenty-five (25), a route for such proposed railroad twenty-five feet wide, as desired by said company; that such commissioners may be directed to
28 forthwith proceed to lay off such route as aforesaid.

That they be directed to have the same carefully surveyed and ascertain the quantity of land necessary to be taken for such purpose out of each quarter section through which such road is located, and appraise the value thereof and assess the damages thereto, and that if such commissioners shall ascertain that such portion of such quarter section belongs to different owners they appraise the value and assess the damage of each such owner's interest.

KAW VALLEY RAILWAY & IMPROVEMENT COMPANY,
By PRATT, BRUMBACK & FERRY, *Its Att'ys.*

That thereupon, on said 18th day of April, 1882, said judge, upon said application in writing, under his hand, appointed N. McAlpine, W. H. Ryus, and L. H. Wood, three freeholders, residents of Wyandotte county, commissioners for the purpose in said petition specified; which said appointment is in the words and figures following, to wit:

Before Hon. W. R. Wagstaff, judge of the district court of Wyandotte county.

In the Matter of the Application of THE KAW VALLEY RAILWAY & IMPROVEMENT COMPANY for the Appointment of Commissioners to Condemn Land.

On reading and filing the application in writing of the Kaw Valley

Railway & Improvement Company, a corporation duly created and existing under and by virtue of the laws of the State of Kansas, whereby it appears that said company proposes to construct its railroad through section twenty-three (23), in township eleven (11), range twenty-five (25), in said county of Wyandotte, and praying for the appointment of three commissioners, freeholders and residents of said county, to lay off along the line of such proposed road as located through said section a route for such proposed railroad twenty-five feet in width, as desired by said company:

It is hereby ordered that N. McAlpine, W. H. Ryus, & L. H. Wood, three freeholders and residents of Wyandotte county, be, and they are hereby, appointed three commissioners for the purpose aforesaid.

And said commissioners are hereby directed to proceed forthwith to lay off such route through said section twenty-three (23) and of the width aforesaid, as desired by said company.

That said commissioners have the same carefully surveyed and ascertain carefully the quantity of land necessary for such route out of each quarter section through which such road is located, and appraise the value thereof and assess the damages thereto, and that if said commissioners shall ascertain that such portion of such quarter section belongs to different owners they appraise the value and assess the damages of each such owner's interest, and that they make and file a report of their doings in the premises, persuant to the statute in such case made and provided.

W. R. WAGSTAFF,
Dist. Judge.

That said petition and order of appointment were on the same day duly recorded in the office of the register of deeds for said Wyandotte county; that on the 19th day of April, 1882, said commissioners were duly sworn to faithfully discharge their duties as such commissioners.

That on the 20th day of April, 1882, said commissioners caused a notice of the time when they would proceed to lay off a route for said railroad through said section twenty-three (23), in township (11), range twenty-five (25), and appraise the value and assess the damages to each quarter section through and over which said railroad might be located, to be published in the Wyandotte Herald, a newspaper printed and published weekly in said county of Wyandotte and of general circulation therein, and the same to be published weekly thereafter in each issue of said paper up to the 22ond day of May, 1882; which said notice is in the words and figures following, to wit:

Railroad Notice.

To all persons owning lands on the line of the railroad of the Kaw Valley Railway and Improvement Company as the same is now or may be located through section twenty-three (23), in township eleven (11) of range twenty-five (25), in the county of Wyandotte and State of Kansas:

You are hereby notified that the undersigned commissioners, duly appointed by Hon. W. R. Wagstaff, judge of the district court of said county, upon the application in writing of said company for that purpose, will, on Monday, May 22ond, 1882, proceed to lay off a rout for said railroad through said section, and appraise the value of and assess the damages to each quarter section through and over which said railroad is or may be located.

N. McALPINE,
W. H. RYUS,
L. S. WOOD,
Commissioners.

That on said 22ond day of May, 1882, said commissioners, in pursuance of said order of appointment and said notice, preceeded to lay of- a rout for the railroad of said defendant through said section twenty-three (23), township eleven (11), range twenty-five (25), in said county of Wyandotte, and upon the line of which said railroad was located, and appraised the value of the portion so laid off and assessed the damages thereto, and thereupon made and signed a written report of their doings in the premises; which said report, except the exhibits thereto attached, is in the words and figures following, to wit:

31 Before Hon. W. R. Wagstaff, judge of the district court of Wyandotte county, Kansas.

In the Matter of the Application of THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY for the Appointment of Commissioners to Condemn Land in Wyandotte County.

The undersigned commissioners, duly appointed in the above matter by Hon. W. R. Wagstaff, judge of the district court of said Wyandotte county, by an order made herein on the 18th day of April, 1882, which is filed herewith, marked Exhibit A, do hereby, in pursuance of the terms and provisions thereof, make and file this our report of our doings in the premises:

That we took the oath provided by law to faithfully and honestly discharge our duties, which is hereto attached and made a part hereof, and is marked Exhibit "B."

That we gave notice we would on the 22nd day of May, 1882, proceed to lay off the rout for said railroad through section twenty-three (23), of township eleven (11), of range twenty-five (25), in said county of Wyandotte and State of Kansas, and appraise the value of and assess the damages to each quarter section through and over

which said railroad is or may be located; which said notice was given by publication in the Wyandotte Herald, a newspaper published in and of general circulation in said Wyandotte county, more than thirty days before the time so fixed, the first publication of which was on the 20th day of April, 1882, and was published in said paper each week up to the time so fixed, a copy of which notice, with proof of due publication thereof, is hereto attached and made a part hereof, and marked Exhibit C.

That, in pursuance of said order and notice, we did on the 22ond day of May, 1882, proceed to lay off such rout through said
32 section over and upon the line on which the said railroad is located; that we had a strip of land twenty-five (25) feet in width, as desired by said railroad company, over and across the northwest quarter of said section twenty-three (23) for its right of way, carefully surveyed, and ascertained carefully the quantity of land necessary for such purpose out of such quarter section through which said route is located, and appraised the value of such portion of such quarter section, which is described as follows:

A strip of land twenty-five (25) feet wide in the N. W. qr. (¼) of section 23, T. 11, R. 25, Wyandotte county, Kansas, lying between two lines which extend from the line between the States of Missouri and Kansas to the east bank of the Kansas river; the center line between the said boundary line begins at a point on said State line $890\frac{8}{10}$ feet south of the southwest corner of the northwest ¼ of sec. 7, T. 49, R. 33, Jackson county, Missouri, and runs on a curve of which the radius is $603\frac{8}{10}$ feet for a distance $402\frac{1}{10}$ feet, deflecting to the right from a tangent which bears south 56 degrees 24 minutes west at said point of beginning, thence running $79\frac{3}{10}$ feet on a tangent bearing N. 85 degrees 24 minutes W.; thence deflecting to the right and running $321\frac{3}{10}$ feet on a curve of which the radius is $644\frac{3}{10}$ feet; thence on a tangent bearing N. 56 degrees 49 minutes west to the east bank of the Kansas river, containing $\frac{4}{100}$ of an acre, and which is the quantity of land required by said company out of said quarter section, at $725.00, and assessed no damages to said land out of which the same is taken, thus making a total of $725.00; that said land belongs to the heirs of A. B. Huling, who are entitled to said $725.00.

33 That upon the tracing which is hereto attached, made a part hereof, and marked Exhibit D, the center line of said railroad is marked in red.

L. H. WOOD.
N. McALPINE.
W. H. RYUS.

That thereupon and on the 6th day of June, 1882, said commissioners filed said report, with the exhibits thereto attached, in the office of the county clerk of said Wyandotte county.

That said county clerk thereupon made a copy of said report, and on the 8th day of June, 1882, filed the same in the office of the treasurer of said county of Wyandotte.

That thereupon, after said filing and on the same day, the de-

fendant caused to be paid to said county treasurer the sum of $725.00, which was the full amount of such appraisement so made by said commissioners; that thereupon and on the same day said county treasurer endorsed upon said copy of said report so filed with him a certificate of said payment under his hand and seal of office.

That thereupon and on the same day the defendant caused such copy of said report, with the certificate of the county treasurer thereon, to be filed and recorded in the office of the register of deeds for said county of Wyandotte.

That thereupon and thereafter said defendant took possession of the property so as aforesaid condemned and constructed upon it a railroad, and has ever since been in actual possession of and operating the same.

That the lands so acquired by this defendant by virtue of the condemnation proceedings above set forth is the same land described in the petition herein as unlawfully entered upon and taken by defendant.

And this defendant denies each and every allegation of said petition not hereinbefore in this second defense specifically ad-
34 mitted; wherefore defendant prays to *to* be dismissed with its costs.

PRATT, BRUMBACK & FERRY,
Att'ys for Def'ts.

Endorsed: No. 4208. U. S. circuit court, district of Kansas. George D. Huling *et al. vs.* Kaw Valley Railway and Improvement Co. Answer. Filed May 31, 1883. A. S. Thomas, clerk. Filed June 15, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy.

And at the same term of said court plaintiffs filed their demurrer to said answer; which is as follows:

Demurrer.

In the Circuit Court of the District of Kansas. June term, 1883.

GEORGE D. HULING *et al.*, Pl't'ffs,
vs.
THE KAW VALLEY RAILWAY AND IMPROVEMENT CO., Def't.

Plaintiffs, for their demurrer to the second count of defence in defendant's answer herein, say:

1. That said district court of Wyandotte county, Kansas, and said board of commissioners or commissioners, never acquired jurisdiction over the owners of the land, the plaintiffs herein, or said land described, for the reason that said alleged notice in said alleged proceedings is not such as is required by law in such cases.

2. That said second defence in said answer does not state facts sufficient to constitute a defence to this action.

ALDERSON & YOUNG &
BYRON SHERRY,
For Pl't'fs.

Endorsed: No. 4208. George D. Huling *et al.* vs. Kaw Valley Railway & Improvement Co. Demurrer to answer. Filed June 4, 1883. A. S. Thomas, clerk. Alderson & Young & B. Sherry.

Which said demurrer was, at said same term, argued by the respective attorneys for said parties, and, being heard by the
35 court, the same was overruled; to which action of the court the plaintiffs then and at said time duly excepted; whereupon, by consent of parties, plaintiffs were allowed by the court — days to file a reply to said answer, and said cause was continued.

One the 23rd day of October, 1883, plaintiffs filed their said reply; which was as follows:

Reply.

In the Circuit Court of the United States for the District of Kansas.

GEORGE D. HULING *et al.*, Pl't'ffs,

vs.

THE KAW VALLEY RAILWAY & IMPROVEMENT COMPANY, Def't.

Plaintiffs, for reply to defendant's answer herein, deny each and every allegation therein contained, except hereinafter admitted.

2. Plaintiffs, further answering, say that said alleged condemnation proceedings and judgment of the district court of Wyandotte county, Kansas, and of the alleged commissioners appointed by said court, and each and all of their said acts and doings set up as a defence in defendant's second defence herein, are illegal and invalid and constitute no defence to this action, for the reason that L. H. Wood, one of said alleged commissioners in said proceedings, was not at said time of his alleged appointment, or during the alleged proceedings of said commissioners, a freeholder and resident of said Wyandotte county, Kansas, through which said railroad was to be laid off and is now constructed.

ALDERSON & YOUNG &
BYRON SHERRY,
Att'ys for Pl't'ffs.

Endorsed: No. 4208. George D. Huling *et al.* vs. Kaw Valley Railway and Improvement Co. Reply. We consent that the
36 within reply may be filed. Pratt, Brumback & Ferry. Oct. 23rd, 1883. Filed Oct. 23, 1883. A. S. Thomas, clerk, by Frank J. Thomas, deputy. Alderson & Young & Byron Sherry.

And on the 22nd day of May, 1884, plaintiffs, by consent of defendant in writing, filed their amended reply, which is as follows:

Amended Reply.

In the United States Circuit Court for the District of Kansas. June Term, 1884.

GEORGE D. HULING & LUCY E. HULING, Plaintiffs,

vs.

THE KAW VALLEY RAILWAY & IMPROVEMENT CO., Def'ts.

Reply.

Now comes plaintiffs and, for reply to defendant's answer herein, deny each and every allegation therein contained.

2nd. Plaintiffs, further answering, say that said alleged condemnation proceedings and all the acts, judgments, and proceedings of the district court of Wyandotte county, Kansas, and of the alleged commissioners' appointment by said court, and each and all of their said acts and proceedings, as set up in defendant's second defense of its answer herein, are illegal and invalid and constitute no defence to this action, for the reason that L. H. Wood, one of the said alleged commissioners in said proceedings set out, was not at said time of his appointment or thereafter a freeholder and resident of said Wyandotte county, Kansas, through which said road was to be laid off, in that he was not the owner or possessed of the legal title to any real estate in said Wyandotte county or any other county of said State, as required by law.

3rd. That plaintiffs, at all the times of said alleged pro-
37 ceedings and ever since, have been residents and citizens of the State of Missouri; that they never had any knowledge or information of said alleged proceedings and were not present at the same, nor ever authorized any one to appear for them or ever in any manner consented to such proceedings; that all of said alleged acts and things were done against their will.

ALDERSON & YOUNG AND
BYRON SHERRY,
Att'ys for Pl't'ffs.

Endorsed: No. 4208. G. D. Huling *et al. vs.* The Kaw Valley R'y and Improvement Co. Amended reply. This amended reply may be filed. Pratt, Brumback and Ferry, att'ys for def't. Filed May 22, 1884. A. S. Thomas, clerk. Alderson & Young & Byron Sherry, for pl't'ffs.

On the — day of June, 1884, said cause was, by stipulation of parties in writing, duly filed — continued to the next, November, term of said court; and on the — day of November, 1884, the following stipulation was filed in said cause:

Stipulation for Continuance.

In the Circuit Court of the District of Kansas. Nov. Term, 1883.

GEORGE D. HULING *et al.*

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT CO.

It is hereby agreed by and between the parties in the above cause that the same be continued to the next term of said court.

ALDERSON & YOUNG,
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Endorsed: No. 4208. George D. Huling *et al. vs.* The Kaw Valley Railway and Improvement Co. Stipulation for continuance. Filed Dec. 3, 1883. A. S. Thomas, clerk.

Waiver of Jury.

In the U. S. Circuit Court of the State of Kansas. Nov. Term, 1884.

38 GEORGE D. HULING *et al.*

vs.

THE KAW VALLEY R'Y & IMP. CO.

We hereby waive a trial by jury in the above cause and consent that the same may be tried by the court.

ALDERSON & YOUNG, *Att'ys for Pl'ff.*
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Endorsed: No. 4208. In the U. S. circuit c't for district of Kansas. Geo. D. Huling *et al. vs.* The Kaw Valley R'y & Improvement Company. Stipulation waiving jury. Filed Nov. 29, 1884. A. S. Thomas, clerk.

Whereupon, on the 6th day of January, 1885, said cause coming on to be heard, plaintiffs and defendants being present by themselves and their respective attorney-, the following proceedings were had, to wit:

Defendant waived proof of title in plaintiffs at the time of said condemnation proceedings and admitted title and possession in them at said time, and admitted the taking and occupancy of the land described in plaintiffs' petition, being the same as described in the condemnation proceedings as set up in their answer, and that defendant was still in possession of same and operating its railway over the same.

Plaintiffs then offered the testimony of witnesses tending to show

that the value of and damages to said premises and improvements by said alleged taking would exceed the sum of five thousand dollars, when plaintiffs here rested their case.

The defendant, to support the issues on its behalf, introduced in evidence a duly certified copy of the alleged condemnation proceedings, which plaintiffs admitted was a true and correct copy of
39 said records and of said proceedings, and which is in words and figures the same and identical with their answer as heretofore in this record set out. Defendant then rested its case.

Plaintiffs then offered in evidence the following deposition of L. H. Wood, one of the alleged commissioners in said condemnation proceedings, deponent expressly waiving the personal appearance of said Wood, said deposition being in words and figures as follows:

Deposition of L. H. Wood.

In U. S. Circuit Court, District of Kansas.

L. E. HULING & G. D. HULING, Plaintiffs,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, Defendants.

It is stipulated and agreed by and between the parties hereto that, for the convenience of both of said parties, the deposition of one L. H. Wood, of Wyandotte, Kansas, to be read in this cause on the part of the plaintiffs at the trial of said action, may be taken this 9th day of January, 1884, in the office of said named Wood, in said city of Wyandotte, both parties there appearing by their attorneys, and the defendant waives all objections and exceptions to notice and the service of notice, and agrees that the deposition of said Wood so taken as aforesaid may be read by said plaintiffs as the testimony of said plaintiffs at the trial of said cause.

ALDERSON & YOUNG, *For Plaintiffs.*
PRATT, BRUMBACK & FERRY,
Att'ys for Def't.

Depositions of sundry witnesses taken before me, Daniel Rich, a notary public within and for the county of Wyandotte, in the State of Kansas, on the 9th day of January, 1884, between the hours of eight a. m. and six p. m., at the office of L. H. Wood, in said city of Wyandotte, Wyandotte county, Kansas, pursuant to the annexed agreement, to be read in evidence on behalf of the plaintiffs in the said action.

40 L. H. WOOD, of lawful age, being by me first duly examined, cautioned, and solemnly sworn to testify the truth, the whole truth, and nothing but the truth, deposeth and saith:

Ques. State your name, age, and residence and occupation.

Ans. My name is Luther H. Wood; age, fifty-five; residence, Wyandotte, Kansas; occupation, real estate and insurance agent.

Ques. Do you remember the condemnation proceedings of the Kaw Valley Railway and Improvement Company wherein a strip of land of the plaintiffs in Wyandotte county, Kansas, was condemned by said railway and improvement company?

Ans. Yes; it was pretty early in 1882. *Ques.* At that time and during those proceedings I resided in Wyandotte county, Kansas, and I am the L. H. Wood or Luther H. Wood named in said proceedings as one of the commissioners.

Ques. Did you in the year 1882 or during the pendency of the said condemnation proceedings own any real estate whatever in the county of Wyandotte, Kansas, in fee simple?

Defendant objects upon the ground that the question is incompetent, immaterial, and irrelevant.

Ans. I did; but the same was not in my own name of record, but in the name of James S. Wood. Part of said real estate was lots twenty-four, twenty-five, twenty-six, and twenty-seven, in block one hundred and eighteen, in Wyandotte city, Kansas.

Ques. What other property did you own, as you say, which was in the name of J. S. Wood during 1882 and the time you acted as commissioner in said proceedings?

Defendant objects upon the ground that the question is incompetent, immaterial, and irrelevant.

Witness objects to answering, not wishing to state what
41 other property he did own at that time in the county of Wyandotte, State of Kansas.

Ques. Was all the property that you say you owned at the time aforesaid deeded to you, either by war-anty or quitclaim deed to yourself or to the said James S. Wood?

Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. It was deeded to James S. Wood direct.

Ques. Then, during the time that you acted as said commissioner or at any time in the year 1882, did the records of Wyandotte county in the office of the register of deeds show any title to any real estate in Wyandotte county, Kansas, to be invested in you, either a title or interest in fee simple or any legal or equitable title, or did you or any one, to your knowledge, hold in your or his possession any deed which transfer-ed to you any title whatever to any real estate in the county of Wyandotte, Kansas, or in any other county in the State of Kansas?

Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. I did not know of any, nor do I know now of any.

Ques. What do you mean by saying you owned real estate in Wyandotte county at the time you acted as commissioner as aforesaid or in the year 1882, but that the deeds to all of said property were mad

to James S. Wood, as grantee, and the title in fee simple of said property was in said Wood?

Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. I mean that the deeds were so made at my request and with his knowledge, and that the purchase-money was my own, and I furnished the purchase-money.

Ques. Did James S. Wood know why you wished the said property transfer-ed to him?

42 Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. I presume he did, as I had often talked with him with regard to my business matters, he being my father-in-law—that is, my wife's father.

Ques. What was your object in purchasing property with your own money, as you say, and having the deed to the same made to your said father-in-law instead of making yourself the grantee in said deed or deeds, transfer-ing the title in and to such property as you bought with your own money, as you say?

Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. Because I was involved financially for debts contracted some years ago and did not wish to put myself in a position to be stripped of what little I had until I had time to settle up and pay my liabilities.

Ques. Then the real estate which you say you owned at the time you acted as commissioner in the condemnation proceedings aforesaid, or at any time in 1882, and which you say you paid for with your own money, was deeded to your said father-in-law, and stood so deeded at said time, because you wished to prevent your creditors from getting the same to satisfy your debt or debts to them?

Defendant objects upon the ground that the question is incompetent, irrelevant, and immaterial.

Ans. Yes. As I stated above, I did not wish to put myself in a position to be stripped of what little I had.

L. H. WOOD.

I, Daniel Rich, a notary public within and for the county of Wyandotte, in the State of Kansas, do hereby certify that L. H. Wood was by me first *severally* sworn to testify the truth, the whole truth, and nothing but the truth, and that the depositions by him
43 subscribed as above set forth was reduced to writing by myself in the presence of the said witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed agreement specified; that I am not counsel, attorney, or relative of either party or otherwise interested in the event of this suit; that the plaintiffs appeared by Alderson, their

attorney, of the firm of Alderson and Young, at the said time and place, and that the defendants also appeared at the said time and place by Ferry, their attorney, of the firm of Pratt, Brumback and Ferry.

My commission expires April 20th, 1888.

[SEAL.] DANIEL RICH,
Notary Public.

Fees of notary and sheriff	$3 50
Fees of witness	1 50
Total	$5 00

All paid by plaintiff.
Postage, 10c.

Opened at the instance and request of Alderson & Young, att'y-for pl'ff-, Jan. 6, 1885. 4208.

A. S. THOMAS, *Clerk.*

Filed Jan. 14, 1884.

Whereupon defendant, by its counsel, then and there objected to said testimony of said Wood as immaterial, incompetent, and irrelevant.

The court sustained defendant's objections, to which the plaintiffs then and there duly excepted. The plaintiffs then rested.

This was all the evidence offered in the case. The case was then submitted to the court, which rendered judgment for the defendant, as follows:

Judgment.

UNITED STATES OF AMERICA, *District of Kansas*, } *ss:*

At a term of the circuit court of the United States of America for the district of Kansas, begun and held at the city of Topeka, in said district, on Monday, the 24th day of November, 1884, proceedings were had and appear of record in words and figures following, to wit:

44

GEORGE D. HULING and LUCY E. HULING
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY. } 4208.

TUESDAY, *Jan'y 6th*, 1885.

Now comes the plaintiffs herein, by Alderson and Young, their attorneys, and also comes defendant, by Pratt, Brumback and Ferry, its attorneys; and thereupon this action came on for trial, and the parties hereto, by their attorneys, waive a jury herein, by written stipulation filed, and submitted the premises to the court; and thereupon the court, having heard the evidence adduced and arguments of counsel, now find for the defendants; and thereupon it is by the court here considered, ordered, and adjudged that the said Kaw

Valley Railway and Improvement Company, defendant herein, go hence without day and have and recover of George D. Huling and Lucy E. Huling, plaintiffs herein, its costs in this action extended, and that execution issue therefor; and on motion of said plaintiffs *and on motion of said plaintiffs* it is ordered that they have 30 days from this time in which to prepare bill of exceptions.

Plaintiffs therefore pray the court to allow and sign this bill of exceptions, and that the same be signed and sealed and made a part of the record, which is done this 17th day of February, 1885, during the term of said court *it* which the trial was had.

C. G. FOSTER,
Dist. Judge.

We consent that the foregoing may be signed as the plaintiffs' bill of exceptions in the above-entitled cause, and that the time for prepairing and signing the same be extended to March 1st, 1885.

PRATT, BRUMBACK AND FERRY,
Att'ys for Def't.

45 Endorsed: No. 4208. Geo. D. Huling *et al. vs.* Kaw Valley Railway & Improvement Company. Bill of exceptions. Filed Feb. 17, 1885. A. S. Thomas, clerk.

46 In the Circuit Court of the United States for the District of Kansas. Nov. Term, 1884.

GEORGE D. HULING & LUCY E. HULING, Pl't'ffs,
vs.
THE KAW VALLEY RAILWAY & IMPROVEMENT COMPANY, Def'ts.

Know all men by these presents that we, G. D. Huling and Lucy E. Huling, as principals, and all of the State of Missouri, are held and firmly bound unto the Kaw Valley Railway and Improvement Company, of the State of Kansas, in the sum of five hundred dollars, to be paid to the said defendant company, its successors or assigns; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated this 22nd day of January, 1885.

Whereas the above-named plaintiffs are about to prosecute a writ of error in the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the district of Kansas:

Now, therefore, the condition of this obligation is such that if the above-named plaintiffs shall prosecute their said writ of error to effect and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to remain in full force and effect and virtue.

47 Sealed and delivered in the presence of—

G. D. HULING. [SEAL.]
LUCY E. HULING. [SEAL.]
WM. H. CHAPMAN. [SEAL.]

STATE OF MISSOURI, } ss:
County of Jackson, }

G. D. Huling and W. H. Chapman, being duly sworn, depose and say and each for himself saieth that he is worth the sum of five hundred dollars over and above all his just debts and liabilities.

G. D. HULING.

—— ——.

Sworn to before me this 22nd day of January, 1885.

[SEAL.] ALBERT YOUNG,
Notary Public.

Approved Feb'y 17, 1885.

C. G. FOSTER, *Judge.*

Endorsed: No. 4208. G. D. Huling *et al. vs.* Kaw Valley Railway & Imp. Co. Bond. Filed Feb. 17, 1885. A. S. Thomas, clerk.

48 UNITED STATES OF AMERICA, } ss:
District of Kansas, }

I, A. S. Thomas, clerk of the circuit court of the United States of America for the district of Kansas, do hereby certify the foregoing to be a true, full, and correct copy from the record of all the proceedings had in said court in the action of George D. Huling and Lucy E. Huling *vs.* The Kaw Valley Railway and Improvement Company, No. 4208 in said court.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Topeka, in said district of Kansas, this 23rd day of April, A. D. 1885.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

A. S. THOMAS, *Clerk.*

49 UNITED STATES OF AMERICA, ss:

The President of the United States to the honorable the judges of the circuit court of the United States for the district of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between George D. Huling and Lucy E. Huling, plaintiffs, and The Kaw Valley Railway and Improvement Company, defendant, a manifest error hath happened, to the great damage of the said plaintiffs, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings

aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States of America, this 30th day of March, A. D. 1885.

[The Seal of the Circuit Court of the United States, District of Kansas, 1862.]

A. S. THOMAS,
Clerk of the Circuit Court of the United States for the District of Kansas.

Allowed:
C. G. FOSTER, *Judge.*

[Endorsed:] No. 4208. The Kaw Valley Railway and Improvement Company, plaintiff in error, *vs.* Geo. D. Huling and Lucy E. Huling, defendants in error. Writ of error. Filed March 30, 1885. A. S. Thomas, clerk.

50 The United States of America to the Kaw Valley Railway and Improvement Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the district of Kansas, wherein The Kaw Valley Railway and Improvement Company is plaintiff and Geo. D. Huling and Lucy E. Huling are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this 30th day of March, A. D. 1885.

C. G. FOSTER, *Judge.*

Service of above citation is hereby admitted.
April 4th, 1885.

KAW VALLEY RAILWAY & IMPROVEMENT CO.,
By PRATT, BRUMBACK & FERREY,
Its Attorneys.

Endorsed on cover: Kansas C. C. U. S. No. 230. George D. Huling and Lucy E. Huling, plaintiffs in error, *vs.* The Kaw Valley Railway and Improvement Company. Filed March 11, 1886.

IN THE

Supreme Court of the United States,

At the October Term, A. D. 1887.

GEORGE D. HULING, AND
LUCY E. HULING,
Plaintiffs in Error,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY,
Defendant in Error.

No......

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Statement, Brief and Argument for Plaintiffs in Error.

HUNTON & CHANDLER,
Of Counsel for Plaintiffs.

ALBERT YOUNG,
Counsel for Plaintiffs.

KANSAS CITY:
PANTAGRAPH JOB OFFICE, SHEIDLEY BUILDING, NINTH AND MAIN STREETS.
1887.

IN THE

Supreme Court of the United States,

At the October Term, A. D. 1887.

GEORGE D. HULING, AND
LUCY E. HULING,
Plaintiffs in Error,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY,
Defendant in Error.

No......

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Statement, Brief and Argument for Plaintiffs in Error.

ALBERT YOUNG,
Counsel for Plaintiffs.

HUNTON & CHANDLER,
Of Counsel for Plaintiffs.

STATEMENT.

I.

This is an action in the nature of assumpsit, brought to the June term, A. D. 1883, of the Circuit Court of the United States for the District of Kansas, by George D. Huling and Lucy E. Huling, citizens of the State of Missouri, as plaintiffs, and The Kaw Valley Railway and Improvement Company, a corporation of the State of Kansas, as defendant, to recover the sum of ten thousand dollars, for the value of a tract of land about a half an acre, and for damages to the remaining portion of said land, the same having been taken and occupied by the defendant under a pretended condemnation proceeding, for its railway track. The petition or declaration filed by plaintiffs, is as follows:

"Plaintiffs, for their cause of action against the "defendant, allege that they are all citizens of the "State of Missouri, and that defendant is a corpor- "ation organized and existing under and by virtue "of the laws of the State of Kansas, and a resident "of said State; that the plaintiffs are the owners "in fee simple of the south half of the following "described tract of land, to wit: and were the "owners of same at the time of the grievance here- "inafter mentioned."

[Here follows a full description of the entire tract by meters and bounds, lying and situate in the State of Kansas.]

"The said railway company did, on or about "the first day of September, 1882, unlawfully and

"without right enter upon, take possession of, con-
"vert and appropriate to its use a strip of said land,
"as above described, said strip being described as
"follows, to wit: (Here follows description of the
"land taken and occupied by the defendant.) * *
* "That said railway company has fenced off said
"strip, constructed its track upon the same, and is
"now using said land for operating its cars and
"rolling stock. That the value of said strip of
"land so unlawfully taken, converted, appropriated
"and used by the defendant, is the sum of three
"thousand dollars, no part of which sum has been
"paid plaintiffs. That plaintiffs' remaining land
"and lots from which said strip was taken, are les-
"sened in value and greatly damaged by reason of
"said taking, appropriation and using of said strip;
"that the house and improvements and growing
"crops on said premises are damaged and injured
"by reason hereof.

"Plaintiffs say that upon the payment of the
"damages assessed in this action for the taking,
"appropriation and conversion of said land they
"will execute and deliver to said defendant a deed
"of said strip, conveying all their right, title and
"interest to the same.

"Wherefore plaintiffs pray judgment in the
"sum of ten thousand dollars and their costs."

To which the defendant filed its answer, as follows:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

GEORGE D. HULING ET. AL., *Plaintiffs*,
vs.
KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY, *Defendant*.
} ANSWER.

I.

The said defendant, for anwer to the petition of the above named plaintiffs, filed herein, denies the same, and each and every allegation therein contained, except the allegation of its incorporation.

II.

And for a second and further answer to said petition, said defendant admits that it is and was at the several times hereinafter mentioned, a corporation duly created and existing under and by virtue of the laws of the State of Kansas, and avers that among the purposes for which it was created was the construction, maintenance and operation of a railroad through the county of Wyandotte, in the State of Kansas.

"That on or about the 18th day of April, 1882, "in pursuance of the statute of the State of "Kansas in such case made and provided, defendant "made an application in writing to Hon. W. R. "Wagstaff, Judge of the District Court of Wyan- "dotte County, State of Kansas, in the words and "figures following, to-wit:"

"*To Hon. W. P. Wagstaff, Judge of the District Court of Wyandotte County, Kansas:*

"Your petitioner, The Kaw Valley Railway and "Improvement Company, respectfully represents "that it is a corporation duly created and existing "under and by virtue of the laws of the State of "Kansas, and, as authorized by the laws of said "State and its charter, proposes to construct its "railroad through said County of Wyandotte.

"And your petitioner hereby makes this its ap- "plication in writing for the appointment by your "honor of three commissioners, freeholders and "residents of said county. To lay off along the line "of the proposed railroad of your petitioner, as "located by it, through section twenty-three (23), in "township eleven (11), range twenty-five (25), a "route for such proposed railroad twenty-five feet "wide, as desired by said company; that such com- "missioners may be directed to forthwith proceed "to lay off such route as aforesaid.

"That they be directed to have the same care- "fully surveyed, and ascertain the quantity of land "necessary to be taken for such purpose out of each "quarter section through which such road is located, "and appraise the value thereof, and assess the "damages thereto, and that if such commissioners "shall ascertain that such portion of such quarter "section belongs to different owners, they appraise "the value and assess the damage of each such own- "er's interest.

"KAW VALLEY RAILWAY AND IMPROVEMENT CO.,
"BY PRATT, BRUMBACK & FERRY,
"*Its Attorneys.*"

"That thereupon, on said 18th day of April, "1882, said judge, upon said application in writing,

"under his hand appointed N. McAlpine, W. H. Ryus "and L. H. Wood, three freeholders, residents of said "Wyandotte County, commissioners for the pur- "poses in said petition specified, which said ap- "pointment is in the words and figures following. "to wit:"

"*Before Hon. W. R. Wagstaff, Judge of the District Court of Wyandotte County:*

"In the matter of the application of the "Kaw Valley Railway and Improvement Com- "pany for the appointment of commissioners "to condemn land. On reading and filing the "application in writing of the Kaw Valley Rail- "way and Improvement Company, a corpora- "tion duly created and existing under and by "virtue of the laws of the State of Kansas, where- "by it appears that said company proposes to con- "struct its railroad through section twenty-three "(23), in township eleven (11), range twenty-five (25), "in said County of Wyandotte, and praying for the "appointment of three commissioners, freeholders "and residents of said county, to lay off along the "line of such proposed road as located through said "section a route for such proposed railroad twenty- "five feet in width, as desired by said company.

"It is hereby ordered that N. McAlpine, W. H. "Ryus and L. H. Wood, three free-holders and res- "idents of Wyandotte County, be and they are "hereby appointed three commissioners for the pur- "poses aforesaid.

"And said commissioners are hereby directed "to proceed forthwith to lay off such route through "said section twenty-three (23), and of the width "aforesaid, as desired by said company.

"That said commissioners have the same carefully surveyed, and ascertain carefully the quantity of land necessary for such route out of each quarter section through which such road is located, and appraise the value thereof and assess the damages thereto; and that if said commissioners shall ascertain that such portion of such quarter section belongs to different owners, they appraise the value and assess the damages of each such owner's interest, and that they make and file a report of their doings in the premises, pursuant to the statute in such case made and provided.

"W. R. WAGSTAFF,
"*District Judge.*"

"That said petition and order of appointment were on the same day duly recorded in the office of the register of deeds for said Wyandotte County; that on this 19th day of April, 1882, said commissioners were duly sworn to faithfully discharge their duties as such commissioners; that on the 20th day of April, 1882, said commissioners caused a notice of the time when they would proceed to lay off a route for said railroad through said section twenty-three (23), in township eleven (11), of range twenty-five (25), and appraise the value and assess the damages to each quarter section through and over which said railroad might be located, to be published in the Wyandotte Herald, a newspaper printed and published weekly in said County of Wyandotte, and of general circulation therein, and the same to be published weekly thereafter in each issue of said paper up to the 22nd day of May, 1882, which said notice is in the words and figures following, to-wit:"

"RAILROAD NOTICE.

"To all persons owning lands on the line of "the railroad of the Kaw Valley Railway and Im- "provement Company, as the same is now or may "be located through section twenty-three (23), in "township eleven (11), of range twenty-five (25), in "the County of Wyandotte and State of Kansas: "You are hereby notified that the undersigned "commissioners, duly appointed by Hon. W. R. "Wagstaff, Judge of the District Court of said "county, upon the application in writing of said "company for that purpose, will, on Monday, May "22nd, 1882, proceed to lay off a route for said rail- "road through said section, and appraise the value "of, and assess the damages to, each quarter section "through and over which said railroad is, or may "be located.

"N. McALPINE,
"W. H. RYUS,
"L. H. WOOD,
Commissioners."

That on said 22nd day of May, 1882, said commissioners, in pursuance of said order of appointment and said notice, proceeded to lay off a route for the railroad of said defendant through said section twenty-three (23), township (11), range twenty-five (25), in said County of Wyandotte, and upon the the line of which said railroad was located, and appraised the value of the portion so laid off and assessed the damages thereto, and thereupon made and signed a written report of their doings in the premises, which said report, except the exhibits thereto attached, is in the words and figures following, to-wit:

Before Hon. W. R. Wagstaff, Judge of the District Court of Wyandotte County.

"In the matter of the application of the Kaw Valley "Railway and Improvement Company for the "appointment of commissioners to condemn "lands in Wyandotte county.

"The undersigned commissioners, duly ap- "pointed in the above matter by Hon. W. R. Wag- "staff, Judge of the District Court of said Wyan- "dotte county, by an order made herein on "the 18th day of April, 1882, which is filed here- "with, marked 'Exhibit A,' do hereby in pursuance "of the terms and provisions thereof, make and file "this, our report of our doings in the premises;

"That we took the oath provided by law, to "faithfully and honestly discharge our duties, which "is hereto attached and made a part hereof, and is "marked 'Exhibit B.'

"That we gave notice we would on the 22nd "day of May, 1882, proceed to lay off the route for "said railroad through section twenty-three (23), "of township eleven (11), of range twenty-five (25), "in said county of Wyandotte and State of Kansas, "and appraise the value of, and assess the damages "to, each quarter section through and over which "said railroad is or may be located; which said "notice was given by publication in the Wyandotte "Herald, a newspaper published and of general "circulation in said Wyandotte county, more than "thirty days before the time so fixed, the first pub- "lication of which was on the 20th day of April, "1882, and was published in said paper each week "up to the time so fixed, a copy of which notice, "with proof of due publication thereof, is hereto at-

"tached and made a part hereof, and marked "'Exhibit C.'

"That in pursuance of said order and notice, we "did, on the 22nd day of May, 1882, proceed to lay "off such route through said section over and upon "the line on which the said railroad is located; that "we had a strip of land twenty-five (25) feet in "width, as desired by said railroad company, over "and across the northeast quarter of said section "twenty-three (23) for its right-of-way. Carefully "surveyed and ascertained carefully the quantity "of land necessary for such purpose out of such "quarter section through which said route is "located, and appraised the value of such portion "of such quarter section, which is described as fol-"lows:

"'A strip of land twenty-five (25) feet wide in "'the N. W.1-4, of section 23, T. 11, R. 25, Wyandotte "'County, Kansas, lying between two lines which "'extend from the line between the States of Mis-"'souri of Kansas to the east bank of the Kansas "'River. The center line between the said boundary "'lines begins at a point on said state line 890 8-10 "'feet south of the southwest corner of the northwest "'1-4 of Sec. 7, T. 49, R. 33, Jackson County, Mis-"'souri, and runs on a curve of which the radius is "'603 8-10 feet for a distance of 402 1-10 feet, de-"'flecting to the right from a tangent which bears "'south 56 degrees 24 minutes west at said point of "'beginning; thence running 79 9-10 feet on a tan-"'gent bearing N. 85 degrees 24 minutes W.; thence "'deflecting to the right and running 321 2-10 feet "'on a curve, of which the radius is 644 2-10 feet; "'thence on a tangent bearing N. 66 degrees 49 "'minutes west to the east bank of the Kansas "'River, containing 46-100 of an acre; and which

"'is the quantity of land required by said company "'out of said quarter section, at $725; and assessed "'no damages to said land, out of which the same "'is taken, thus making a total of $725; that said "'land belongs to the heirs of A. B. Huling, who "'are entitled to said $725.

"'That upon the tracing which is hereto at-"'tached, made a part hereof and marked Exhibit "'D., the center line of said railroad is marked in "'red.

"L. H. Wood.
"N. McAlpine.
"W. H. Ryus."'

That thereupon and on the 6th day of June, 1882, said commissioners filed said report, with the exhibits thereto attached, in the office of the County Clerk of said Wyandotte county;

That said County Clerk thereupon made a copy of said report, and on the 8th day of June, 1882, filed the same in the office of the treasurer of said County of Wyandotte;

That thereupon after said filing, and on the same day the defendant caused to be paid to the said County Treasurer the sum of $725.00, which was the full amount of such appraisement so made by said commissioners; that thereupon and on the same day said County Treasurer endorsed upon said copy of said report so filed with him a certificate of said payment under his hand and seal of office;

That thereupon and on the same day, the defendant caused such copy of said report, with the certificate of the County Treasurer thereon, to be filed and recorded in the office of the register of deeds for said County of Wyandotte;

That thereupon and thereafter said defendant took possession of the property so as aforesaid con-

demned and constructed upon it a railroad, and has ever since been in actual possession of and operating the same: that the land so acquired by this defendant by virtue of the condemnation proceedings above set forth is the same land described in the petition herein as unlawfully entered upon and taken by defendant.

And this defendant denies each and every allegation of said petition not hereinbefore in this second defense specifically admitted.

Wherefore defendant prays to be dismissed with its costs.

PRATT, BRUMBACK & FERRY,
Att'ys for Defendants.

To this answer plaintiffs filed their demurrer, which is in words as follows, to wit:

"*DEMURRER.*

"IN THE CIRCUIT COURT OF THE DISTRICT OF KANSAS. JUNE TERM, 1883.

"GEORGE D. HULING *et al.*,
Plaintiffs,
vs.
"THE KAW VALLEY RAILWLY AND IMPROVEMENT COMPANY,
Defendant.

"Plaintiffs for their demurrer to the second "count of defense in defendant's answer herein "say :

"1. That said district court of Wyandotte "County, Kansas, or said board of commissioners,

"never acquired jurisdiction over the owners of the "land, the plaintiffs herein, or said land described, "for the reasons that said alleged notice in said "alleged proceedings is not such as is required by "law in such cases.

"2. That said second defense in said answer "does not state facts sufficient to constitute a de- "fense in this action."

This demurrer, after being argued by the respective attorneys for said parties, and being heard by the Court, the same was overruled, to which plaintiff duly excepted at the time.

In due time plaintiffs filed their reply, and by consent of defendant filed their amended reply, which is in words and figures as follows, to-wit:

AMENDED REPLY.

IN THE UNITED STATES CIRCUIT COURT FOR THE DISTRICT OF KANSAS, JUNE TERM 1884.

GEORGE D. HULING AND LUCY E. HULING,
Plaintiffs,

vs.

THE KAW VALLEY RAILWAY AND IMPROVEMENT COMPANY,
Defendant.

REPLY.

Now come plaintiffs, and for reply to defendant's answer, herein deny each and every allegation therein contained.

II.

Plaintiff's further answering, say that said alleged condemnation proceedings, and all the acts, judgments and proceedings of the District Court of Wyandotte County, Kansas, and of the alleged commissioners appointed by said Court, and each and all of their said acts and proceedings as set up in defendant's second defense in its answer herein, are illegal and invalid and constitute no defense to this action, for the reason that L. H. Wood, one of the said alleged commissioners in said proceedings set out, was not at said time of his appointment or thereafter, a freebolder and resident of said Wyandotte county, Kansas, through which said railroad was to be laid off, in that he was not the owner or possessor of the legal title of any real estate in said Wyandotte County, or any other county of said State, as required by law.

III.

"The plaintiffs at all the times of said alleged pro-
"ceedings, and ever since, have been residents and
"citizens of the State of Missouri; that they never
"had any knowledge or information of said alleged
"proceedings, and were not present at the same;
"nor ever authorized any one to appear for them, or
"ever in any manner consented to such proceedings;
"that all of said alleged acts and things were done
"against their will."

By consent of parties, a trial by jury being waived in writing, the cause came up for trial on the 6th day of January, 1885, and plaintiffs and defendants being present by themselves and their counsel, the following proceedings were had, to wit: (See page —, bill of exceptions and record.) "De-

"fendant waived proof of title in plaintiffs at the "time of said condemnation proceedings, and ad- "mitted title and possession in them at said time, "and admitted the taking and occupancy of the "land described in plaintiffs' petition, being the same "as described in the condemnation proceedings as "set up in their answer; and that defendant was still "in possession and operating its railway over same. "Plaintiff then offered the testimony of witnesses "tending to show that the value of and damages to "said premises and improvements by said alleged "taking would exceed the sum of five thousand "dollars, when plaintiffs rested their case.

"The defendant, to support the issues on its "behalf, introduced in evidence a duly certified "copy of the alleged condemnation proceedings, "which plaintiffs admitted was a true and correct "copy of said records and of said proceedings, and "which is in words and figures the same and iden- "tical with the answer as heretofore in their record "set out. Defendant then rested its case.

"Plaintiffs then offered in evidence the follow- "ing deposition of L. H. Wood, one of the alleged "commissioners in said condemnation proceedings, "defendant expressly waiving the personal appear- "ance of said Wood, said deposition being in words "and figures as follows:"

DEPOSITION OF L. H. WOOD.

Ques. State your name, age, and residence and occupation.

Ans. My name is Luther H. Wood; age fifty-five; residence, Wyandotte, Kansas; occupation, real estate and insurance agent.

Ques. Do you remember the condemnation proceedings of the Kaw Valley Railway and Im-

provement Company, wherein a strip of land of the plaintiffs, in Wyandotte County, Kansas, was condemned by said Railway and Improvement Company?

Ans. Yes; it was pretty early in 1882.

Ques. At that time and during those proceedings I resided in Wyandotte County, Kansas, and I am the L. H. Wood or Luther H. Wood named in said proceedings as one of the commissioners.

Ques. Did you in the year 1882 or during pendency of this said condemnation proceedings own any real estate whatever in the County of Wyandotte, Kansas, in fee simple?

(Defendant objects, upon the ground that the question is incompetent, immaterial and irrelevant.)

Ans. I did, but the same was not in my name or record, but in the name of James S. Wood; part of said real estate was lots twenty-four, twenty-five, twenty-six and twenty-seven, in block one hundred and eighteen, in Wyandotte City, Kansas.

Ques. What other property did you own, as you say, which was in the name of J. S. Wood during 1882, and the time you acted as commissioner in said proceedings?

(Defendant objects, upon the ground that the question is incompetent, immaterial and irrelevant.)

Witness objects to answering, not wishing to state what other property he did own at that time in the County of Wyandotte, State of Kansas.

Ques. Was all the property that you say you owned at the time aforesaid deeded to you, either by warranty or quit-claim deed, to yourself or to the said James S. Wood?

(Defendant objects, on the ground that the question is incompetent, irrelevant and immaterial.)

Ans. It was deeded to Jas. S. Wood direct.

Ques. Then during the time that you acted as said commissioner, or at any time in the year 1882, did the records of Wyandotte County in the office of the register of deeds show any title to any real estate in Wyandotte County, Kansas, to be invested in you, either a title or interest in fee simple, or any legal or equitable title; or did you or any one to your knowledge hold in your or his possession any deed which transferred to you any title whatever to any real estate in the county of Wyandotte, Kansas, or in any other county in the State of Kansas?

(Defendant objects, upon the ground that the question is incompetent, irrelevant and immaterial.)

Ans. I did not know of any, nor do I now know of any.

Ques. What do you mean by saying that you owned real estate in Wyandotte county at the time you acted as commissioner as aforesaid, or in the year 1882, but that the deeds to all of said property were made to James S. Wood as grantee, and the title in fee simple to said property was in said Wood?

(Defendant objects, upon the ground that the question is incompetent, irrelevant and immaterial.)

Ans. I mean that the deeds were so made at my request and with his knowledge, and that the purchase money was my own, and I furnished the purchase money.

Ques. Did James S. Wood know why you wished the said property transferred to him?

(Defendant objects, upon the ground that the question is incompetent, irrelevant and immaterial.)

Ans. I presume he did, as I had often talked with him in regard to my business matters. He being my father-in-law, that is, my wife's father.

Ques. What was your object in purchasing property with your own money, as you say, and having the deed to the same made to your said father-in-law instead of making yourself the grantee in said deed or deeds, transferring the title in and to such property as you bought with your own money, as you say ?

(Defendant objects, upon the ground that the question is incompetent, irrelevant and immaterial.)

Ans. Because I was involved financially for debts contracted some years ago, and did not wish to put myself in a position to be stripped of what little I had until I had time to settle up and pay my liabilities.

Ques. Then the real estate which you say you owned at the time you acted as commissioner in the condemnation proceedings aforesaid, or at any time in 1882, and which you say you paid for with your own money, was deeded to your said father-in-law, and stood so deeded at said times because you wished to prevent your creditors from getting the same to satisfy your debt or debts to them ?

(Defendant objects, upon the ground that the question is incompetent, irrelevant and immaterial.)

Ans. Yes ; as I stated above, I did not wish to put myself in a position to be stripped of what little I had.

L. H. Wood.

I, Daniel Rich, a notary public within and for the County of Wyandotte, in the State of Kansas do hereby certify that L. H. Wood was by me first severally sworn to testify the truth, the whole truth and nothing but the truth, and that the depositions by

him subscribed as above set forth, was reduced to writing by myself in the presence of the said witness, and was subscribed by the said witness in my presence, and was taken at the time and place in the annexed agreement specified, that I am not counsel, attorney, or relative of either party, or otherwise interested in the event of this suit. That the plaintiffs appeared by Alderson, their attorney, of the firm of Alderson & Young, at the said time and place, and that the defendants also appeared at the said time and place by Ferry, their attorney, of the firm of Pratt, Brumback & Ferry.

My commission expires April 20th, 1888.

[SEAL.] DANIEL RICH, *Notary Public.*

Upon the objection of the defendant to said testimony, the Court excluded the testimony of said Wood, to which the plaintiff at the time duly excepted. This was all the testimony offered in the case, which being submitted to the Court upon the pleadings and evidence, judgment was rendered for the defendant.

II.

The material parts and sections of the statutes of the State of Kansas under which the alleged condemnation proceedings set up as a defense herein were had, are as follows:

Statutes of Kansas, 1885, chapter 23, Art. 9. APPROPRIATION OF LANDS FOR THE USE OF RAILWAY AND OTHER CORPORATIONS.

> Sec. 86. Before any Board of County Commissioners shall proceed to lay off any railroad route, as herein provided, notice of the time when the same shall be commenced shall be given by publication

thirty days before the time fixed, in some newspaper published in such county, or if none be published therein, then in one of general circulation in the county wherein such railroad is to be laid off; and an appeal shall be had from the determination of the Board of the County Commissioners as to the value of the land, crops, buildings and other improvements on said land, and for all other such damage sustained by such person or persons by reason of such right-of-way so appropriated, in the same manner as appeals are granted from the judgment of a justice of the peace to the District Court; and said appeal and all subsequent proceedings shall only affect the amount of compensation to be allowed, but shall not delay the prosecution of the work on said railroad, upon said company paying or depositing the amount so assessed by said commissioners with the County Treasurer of the county within which the lands are situated; and upon the said company executing a bond with sufficient security, to be approved by the County Clerk, to pay all damages and costs which said company may be adjudged to pay by said district court, said company may, notwithstanding said appeal, take possession of and use the said land and construct its road over the same.

Sec. 87. That any railway corporation, instead of applying to the board of county commissioners as hereinbefore provided, or any person or persons through whose land or premises any railroad has been or is being constructed, may apply to the judge of the district court of the county through which any railroad is or is to be built, for the appointment of three com-

missioners to make the appraisement and assessment of damages instead of the county commissioners; said commissioners shall be freeholders and residents of the county through which such railroad is, or is to be built. Such appointment shall be made by the district judge on the written application of the corporation or the person or persons, their agent or attorney. The appointment shall be made in writing, under the hand of the judge, and delivered to the party applying therefor. The application for the certificate of appointment shall be recorded in the office of the register of deeds of the proper county. In case any vacancy occurs or any such commissioner or commissioners refuse to serve on such board, the district judge shall appoint, in the manner herein provided some other person or persons, having the qualifications herein provided. Such commissioners shall be sworn to honestly and faithfully discharge their duties as such commissioners, and they shall do and perform all things in the manner, and under the same regulations and restrictions as are provided in case such duties were preformed by the county commissioners, and the subsequent and other proceedings, including appeal, shall be done and performed in the same manner, and the railroad company shall pay all costs accruing under any application under this section.

Also, Chap. 104, of same statutes:

AN ACT CONCERNING THE CONSTRUCTION OF STATUTES, p. 919. Words giving joint authority to three or more public officers or other persons, shall be construed as giving such authority to a majority of them, unless it be otherwise expressed in the act giving the authority.

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling the demurrer of plaintiffs to the defendant's answer.

II.

The Court erred in the trial of this cause in excluding the deposition and testimony of L. H. Wood, against the objections of the plaintiff.

III.

The judgment is against the law and the evidence.

IV.

The judgment of the Court should have been for the plaintiffs.

POINTS OF LAW.

Three leading legal propositions are raised by the record and the assignment of errors for determination in this cause.

First. Was the notice of the commissioners as set up in the answer herein, aa compliance with the provisions of the statute of Kansas for such cases ?

Second. Is that statute in its provisions as to notice "due process of law" within the purview of the 14th amendment to the Constitution of the United States ?

Third. Was it competent for the plaintiffs to show by the testimony of L. H. Wood, one of the

alleged commissioners, that he was not a freeholder, and therefore disqualified to act at the appraisement of the land sought to be taken, and thereby contradict the recitals in the record and judgment of the district court, as set up in the answer?

FIRST PROPOSITION.

UPON THE FIRST PROPOSITION IT IS APPARENT THAT THIS NOTICE IS ADDRESSED TO NO PERSON BY NAME, CONTAINS NO DESCRIPTION OF ANY PARTICULAR TRACT OF LAND SOUGHT TO BE TAKEN, ADVISES NO PERSON THAT THEY PROPOSE TO TAKE ANY PORTION OF HIS OR HER LANDS, AND FAILS TO DESIGNATE ANY PLACE WHERE SAID COMMISSIONERS WOULD MEET, OR ANY PARTICULAR TIME, EXCEPT ON MONDAY, MAY 22, 1882.

Such a pretended notice lacks all the elements necessary to afford information to the parties affected, and is upon well accepted principles and authority no notice, and void. Notice is generally said to be whatever is sufficient to put a man of ordinary prudence on inquiry, and in the language of Mr. Justice STORY: "'Whatever is sufficient to put a "party on inquiry (that is, whatever has reasonable "certainty as to *time, place,* circumstances and *per-*"*sons*) is in equity held to be good notice."

2 Story's Equity Jurisprudence, Sec. 400.

Vail v. *Morris and Essex R'y Co.*, 1 Zabriskie (N. J. L.), 189.

Chicago & Alton R. R. Co., v. *Smith*, 78 Ill., 98.

In re N. Y. C. & Hud. R. R. Co. v. *Raw*, 70 N. Y., 191.

Clark v. *City of Elizabeth*, 32 N. J. L., 357.
Strang et al v. *Beloit & Madison R'y Co.*, 16 Wis., 635.
State v. *Plainfield*, 38 N. J. L., 95.
State v. *City of Perth Amboy*, 5 Dutch (N. J.), 259.
Peoria & Rock Island R'y Co. v. *Warner*, 61 Ill., 52.
2 Desty on Taxation, p. 826.
Eastman v. *Little*, 5 N. H., 290.
Farnum v. *Buffum*, 4 Cush., 260.
Kittsmiller v. *Kitchen*, 24 Ia., 163.
Corbin v. *Young*, 24 Kas., 198.

The Supreme Court of New Jersey, in the case *supra* of *Vail* v. *The Morris and Essex R'y Co.*, has been called upon to construe a notice about identical with the one at bar.

The Statute required that the landholder should have notice of the meeting of the commissioners, generally. Condemnation proceedings were had upon the following notice:

"That an application will be made to assess the "price or value of the land owned by him, over "which the said company have located their branch "road from their original road to Dover, and all the "damages which the commissioners so to be ap-"pointed are authorized to assess."

The Court say:

"The radical defect apparent *upon the face* of these proceedings is that it does not appear that the landholder, whose title was sought to be divested,

was in any way *informed* previous to the *meeting* of the commissioners of the *location* or *quantity* of the land required by the company for the use of their road.

"The proceedings were instituted for the purpose of divesting the landholder of the title to his freehold and vesting it in the company. Every principle *of law*, every dictate *of justice*, requires that in such a proceeding the landholder should be *distinctly apprised* of the *extent* of the claim made by the company, and of the *location* of the *land* of which he is to be disseized.

"The statute requires that the landholder shall have notice of the meeting of the commissioners.

"He *is entitled* to *be heard before* them, *and to establish his claim* by *evidence*. But of what avail is his right to be heard and to produce evidence, if he is not *distinctly informed* of the *location* of *the road*, and the *quantity* of the land required by the company for its use? Without this information how can he be prepared to show the extent of his damages.

"It is true, *the charter* does not in *express terms* require such *specification* to be made in the application for the appointment of commissioners, but this necessarily cannot be rendered more imperative, or its propriety more obvious by legislative sanction." Referring to the notice:

"This is the whole specification upon the face "of the proceedings. No reference is made to any "other record where the requisite information may "be procured."

As to necessity of stating *time* and *place* in notice, see further 2 Desty's Taxation, 826–7.

In the matter of *N. Y. C. & H. R'y Co.* v. *Raw supra*, late N. Y. case, where a railroad act expressly required a petition to contain a description of the land, the Court holding a lengthy description void for uncertainty, say:

"Without this, the owner cannot tell what por-
"tion of his land is required. In proceedings of
"this character *extreme accuracy* is *essential* for
"the protection of the rights of all parties, and a
"failure to comply with the statute must lead to
"difficulty and embarrassment."

In another similar case, *Strang et al.* v. *The Beloit & Madison R'y Co. supra*, the Court uses the following language:

"In a case where a company proceeds to con-
"demn land under its charter, there is much reason
"for saying it should define with *precision* the *loca-*
"*tion* and *quantity* required in order to apprise the
"the owner of the extent of the claim, and that he
"may know the situation of the property of which
"he is to be disseized."

The case of the *State* v. *Plainfield supra*, is even more pointed. There a section of the charter of the City of Plainfield required ten days' published notice of the intended adoption by the council of any ordinance.

Objection was raised to the sufficiency of the notice, as it named no *time* and *place*. The Court say: "It is a fundamental law that no man shall be

"deprived of his rights, either of person or property, "without an opportunity to be heard. He cannot be "heard unless he have a reasonable notice of the *time* "when and the *place where* his rights are to be ad- "judged."

Chicago & Alton R. R. Co v. *Smith supra*, was an action in ejectment by Smith against the rail-road company to recover land occupied by the defendant as a right-of-way under a condemnation proceeding. The charter of the defendant railway company provided as follows: "Notice by publica- "tion in some newspaper in St. Clair County shall "be first given for thirty days to the owners or oc- "cupiers or unknown owners, as the case may be, "of the intention on the part of said corporation to "apply to the governor for the appointment of com- "missioners," &c.

It was contended by the company "that the "charter did not require the owner to be named in "the notice," &c.

But, says the Court:

"When a notice is required, and the mode of "service is not specified, the law requires it shall be "personal. And usually, when the notice is required "by *publication*, it must be *directed to the person* "*by name* who is required to be notified; such has "uniformly been the construction placed upon the "chancery act, the attachment act and proceedings "of this character."

And referring to proceedings of this summary nature, the Court proceeds:

"It is a rule of general application, that a party "cannot be deprived of his rights without having "notice and an opportunity to be heard.

"And when the proceedings is summary, and "the notice is only constructive, courts will never "abridge the right to notice, or substitute some- "thing in the place of that required by statute."

In the *State* v. *City of Perth Amboy supra*, the city charter required that "All propositions for "improvements shall be advertised by the council "in one of the city papers, or set up in five public "places of the city for twenty days, and that the "parties interested shall, if they desire, have an op- "portunity of being heard thereon before the coun- "cil or appropriate committe."

The only notice given was the following publication:

"*Resolved*, That the city clerk give notice that "the city council propose to order the construction "of a sewer, * * * and that all per- "sons interested are notified that they will be "heard, if they have objections to offer, before the "committee on sewers within twenty days from "date.

"Perth Amboy, May 21, 1859."

"This notice is deficient in several particulars. "It specifies no *time* nor *place*, *when* and *where*, the "person interested could be heard. The charter does "not in *terms express* that the council shall appoint a "time and place of hearing, but the very *nature* and "object of a *notice require* it. The ordinance was "held void for this reason."

The Peoria & Rock Island Railway Co. v. *Warner supra*, was an action of trespass; the defendant justified by alleging a previous condemnation without proper notice.

The Court says:

"The party whose land is to be taken has the "right to reasonable notice of the *time* and *place* "when and where application will be made for the "appointment of the persons who are to assess the "damages."

SECOND PROPOSITION.

UPON THE SECOND PROPOSITION, THE STATUTE OF KANSAS, SEC. 86, AS TO NOTICE, IS UNCONSTITUTIONAL AND VOID, FOR THE REASON THAT IT FAILS TO PROVIDE FOR ANY PROPER OR REASONABLE NOTICE TO THE LAND OWNER, WHEREBY HE MAY BE HEARD BEFORE HIS LAND IS TAKEN AND CONDEMNED, AND IS THEREFORE NOT "DUE PROCESS OF LAW," AS GUARANTEED BY THE 14TH AMENDMENT TO THE FEDERAL CONSTITUTION.

By the terms of this statute the land owner is not accorded the common civil right of being designated by name, whether known or unknown. No description of the route of the projected road, or description of any land sought to be taken, is required.

Though these commissioners are to meet and hear evidence, and appraise the value of land taken, and adjudicate as to the property of the landowner, yet in the notice no *place* of their meeting is re-

quired where the landowner may appear himself or subpoena his witnesses, or produce his testimony. Well settled and long established principles of an enlightened jurisprudence in this statute are ignored and overthrown.

As well said by Mr. WEBSTER, in his often quoted definition of "due process of law:"

"The meaning is that every citizen shall hold "his life, liberty, property and immunities, under "the protection of the general orders which govern "society; everything which may pass under the "form of an enactment is not therefore to be con-"sidered the law of the land."

Such a statute may be regarded the "law of "the land," in a State (Kansas) whose constitution contains no vestage of a prohibition upon its Legislature from taking "life, liberty or property "without due process of law," that cardinal principal of *magna charta* reserved in nearly all of our State Constitutions; but I submit, that such a statute cannot stand against the prohibition contained in the Fourteenth Amendment.

Davidson v. *New Orleans*, 96 U. S. 97–104.

Hurtando v. *People of California*, 110 U. S., 516–525.

Hagar v. *Reclamation Dist., etc.*, 111 U. S. 701.

Mulligan v. *Smith*, 59 Cal., 206–230.

In *Hagar* v. *Reclamation Dist., etc., supra*, Mr. Justice FIELD has forcibly said:

"It is sufficient to observe here that by 'due "'process of law' is meant one which, follow-

"ing the forms of law, is appropriate to the "the case, and *just* to the parties to be affected. "It must be pursued in the *ordinary* mode pre- "scribed by the law; it must be adopted to the end "to be attained; and wherever it is necessary for "the protection of the parties, it must give them an "*opportunity to be heard* respecting the justice of "the judgment sought. The clause in question "means, therefore, that there can be no proceeding "against life, liberty or property which may result "in the deprivation of either, without the observ- "ance of those general rules established in our jur- "isprudence for the security of private rights."

In *Davidson* v. *New Orleans supra*, Mr. Justice BRADLEY defines very clearly and at length the meaning of this term in our jurisprudence. Referring to Murray's Lessee, &c., case, 18 How. 272:

"But the Court in that case expressly holds that "it is manifest that it was not left to the legislative "power to enact any process which might be de- "vised. The article is a restraint on the legislative "as well as on the executive and judicial power of "the government, and cannot be so construed as to "leave Congress free to make any process 'due pro- "cess of law' by its mere will; p. 276. I think then "we are entitled, under the Fourteenth Amendment, "not only to see that there is some process of law, "but 'due process of law' provided by *the State law* "when a citizen is deprived of his property, and that "in judging what is 'due process of law' to the cause "and object of the taking, whether under the tax-

"ing power, the power of eminent domain, &c.; and "if found to be suitable or admissable in the special "case, it will be adjudged to be 'due process of "law,' but if found to be *arbitrary, oppressive* and "*unjust*, it may be declared to be not 'due process "of law;"' p. 107.

In *Mulligan* v. *Smith*, 59 Cal. *supra*, a well considered case, was an action in ejectment for land sold for nonpayment of a special assessment.

The Court, speaking as to the property owner's right to notice, &c., says:

"Unless the Statutes provided for giving him "notice of the presentation of the petition, and no- "tice was in fact served upon him, if he had no "such notice and no opportunity to be heard upon "it, it is difficult to see how he can be concluded "by an adjudication to which he was not a party "and of which he had no notice. For it is a princi- "pal which underlies all forms of government by "law, that a citizen shall not be deprived of life, "liberty or property without due process of law. "The legislature has no power to take away a "man's property, nor can it authorize its agents to "to do so without first providing for personal no- "tice (or by publication) to be given him, and for a "full opportunity of *time, place* and *tribunal* to *be* "*heard* in *defense of his rights.*"

Referring to a notice given in this case, the Court says:

"This notice was not directed to the *defendant* "or any *property owner by name.* It was not per-

"sonal notice. It was simply a general notice that "the report of the board was open for inspection. "It did not notify or summon any property owner "to appear before the board or the *County Court*, "or any *other tribunal* at any time *or place* to file "objections or assert rights."

THIRD PROPOSITION.

THE COURT SHOULD HAVE PERMITTED THE PLAINTIFFS TO SHOW BY THE TESTIMONY OF L. H. WOOD, ONE OF THE ALLEGED COMMISSIONERS, THAT HE WAS NOT A FREEHOLDER AND [redacted] THEREFORE DISQUALIFIED TO ACT AT THE APPRAISEMENT, AND THEREBY CONTRADICT THE JURISDICTIONAL RECITALS IN THE RECORD OF THE JUDGMENT AND PROCEEDINGS OF THE DISTRICT COURT AS SET UP IN THE ANSWER.

The condemnation proceedings are entirely statutory. They are special proceedings before a court invested with a special jurisdiction for a special purpose, and its judgment and acts must stand or fall, according as they show a strict compliance with the provisions of the statute. It is not as a suit in a court proceeding according to the common law. Hence, any of the acts of the district court or of said commissioners, and any findings or judgment by either of them, are open to collateral attack, and may be impeached for want of jnrisdiction, and being a *foreign judgment*, though the recitals therein may

contain every essential to their jurisdiction, they may be contradicted *aliunde*. Such is the uniform doctrine of this Court.

Harris v. *Hardeman*, 14 How., 334.
Thompson v. *Whitman*, 18 Wall., 457.
Ex Parte Lange, 18 Wall., 163.
Windsor v. *McVeigh*, 93 W. S., 274.
Cooley's Const. Sim. (5th Ed.), p. 502.
2 Wharton's Evidence, Secs. 796-928.
Freeman's Judgments (3d Ed.), Sec. 563 (and notes.)

And the Supreme Court of Kansas has laid down and affirmed the doctrine enunciated in the case of *Thompson* v. *Whitman supra*.

Mastin v. *Gray*, 19 Kansas, 458.
Oliphant v. *Commissioners*, 18 Kansas, 386-98.

FOURTH PROPOSITION.

PROCEEDINGS TO DEPRIVE AN INDIVIDUAL OF HIS PROPERTY OR TO IMPOSE A TAX AGAINST HIS WILL, ARE STRICTI JURIS, AND THOSE WHO TAKE THEM SHOULD SEE NOT ONLY THAT THEY HAVE A FOUNDATION IN LAW FOR THEIR BEGINNING, BUT THAT THEY ARE ALSO CONDUCTED IN STRICT CONFORMITY TO THE REQUIREMENTS OF THE STATUTE WHICH AUTHORIZES THEM.

Hence, where the Statute prescribing the mode or manner of the exercise of the power requires that the damages shall be assessed by freeholders resident of the country in which the property

lies, this is a *condition precedent* and a *jurisdictional requirement*, a *failure* to *comply* with which will render the *proceedings void*. "The mode is the measure of the power."

Cooley's Const. Lim. (5th Ed.), p. 654.
2 Dillon's Mun. Corp., Sec. 607.
Mills on Eminent Domain, Sec. 227.
Duggy v. *Green*, 12 Ind., 303.
State v. *Jersey City*, 25 N. J. L., 309.
Rock Island v. *Lynch*, 23 Ill., 645.
Moore v. *Railway Co.*, 34 Wis., 173.
Nichols v. *Bridgeport*, 23 Conn., 189.
People v. *Brighton*, 20 Mich., 57.

A Court of Equity would not even aid in establishing a resulting trust as claimed by said Wood.

People v. *Hynds*, 30 N. Y., 470.
2 Pomeroy's Equity Jur., Sec. 1042.
1 Perry's Trust (3d Ed.), 149.
Dassler's Comp. Laws of Kansas (1879), p. 989, Sec. 6.
Franklin v. *Colley*, 10 Kas., 260.
Brake v. *Ballou*, 19 Kas., 397.

In People v. *Hynds supra*, was a case precisely like the one at bar as to the qualifications of a freeholder; there the Court says:

"There was not a certificate of twelve *free-*
"*holders*. Dunkle was not a *freeholder*. He had not
"the legal title to the farm. That was either in
"Hutton or Wieting. Dunkle could not convey.
"He had an *equitable* title which might perhaps be

"converted into a legal title. The statute, by free-
"holder, means such as have the legal title to real
"estate—such as are freeholders within a *proceeding*
"in *court* to make or declare them so. If there was
"not a certificate of *twelve freeholders*, the subse-
"quent proceedings would be entirely *void*, and the
"above cases both affirm and apply the same princi-
"ple. Having cnnfessedly had the title to his prop-
"erty put in another party to avoid his creditors. No
"proceedings in court would avail him, as well
"settled by the statute of his own state and the de-
"cisions thereunder heretofore cited."

FIFTH PROPOSITION.

L. H. WOOD, ONE OF THE THREE ALLEGED COMMISSIONERS APPOINTED BY THE DISTRICT COURT OF WYANDOTTE COUNTY, WAS NOT A FREEHOLDER, FROM HIS OWN TESTIMONY, AS APPEARS BY HIS DEPOSITION SET OUT IN THE STATEMENT HEREIN.

To constitute a freeholder one must have the legal title, or at least, an equitable one that he can convert into a legal one. He confesses to have no legal title, and from his testimony only a resulting trust which a court of equity would not aid him in establishing, because confessedly conveyed in fraud of his creditors.

(A.) Essentially to constitute a freeholder:

2 Washburn's Real Prop. (4th Ed.), p. 23–71.

People v. *Hyndes*, 30 N. Y., 473.

Exentine v. *Morris*, 8 Mo. App., 387–8.
Gage v. *Scales*, 100 Ill., 221.
Bradford v. *State*, 15 Ind., 347–353.
Clippinger v. *Creps*, 2 Watts, 45.
N. O., etc., R. R. Co. v. *Hemphill*, 35 Miss., 17.
Aaron v. *State*, 37 Ala., 106.
State v. *Ryland*, 75 N. C., 12.

VI.

Chap. 104, Sec. 5675, Part "Fourth," Revised Laws of the State of Kansas, 1879, is relied upon by the defendant to support the verdict of the Commissioners. Said section is as follows:

"Words giving a joint authority to three "or more public officers or other persons, shall be "construed as giving such authority to a majority "of them, unless it be otherwise expressed in the "act giving the authority."

But we submit that it is contemplated and "expressed" in Sec. 87 of Rev. Statutes of Kansas, heretofore quoted, that "In case any vacancy occurs, or any such commissioner or commissioners refuse to "serve on such board, the district judge shall ap-"point in the manner herein provided, some other "person or persons having the qualifications herein "provided."

These commissioners must first *all* be *qualified* freeholders, and then a *majority* may act when they *all deliberate and confer.*

But in the case at bar *all acted*, but only *two* were *qualified*, hence the appraisement is a *nullity* and *coram non judice.*

Mills' Eminent Domain, Secs. 251–256.
Rock Is. & Alton R. R. Co. v. *Lynch*, 23 Ill., 645.
Broad St. Road, &c. 7 S. & R., 444.
Wells Co. Road, 7 O. St., 16.
18 Queen's Bench, 416–21.
Daggy v. Green, 12 Ind., 303.
Taylor v. *Co. Commissioners*, 105 Mass., 225.
People v. *Com'rs of Highway*, 27 Barb., 94.
Wood v. *Phelps Co. R.* 28 Mo., 119.

The provision of the Statute of Kansas just quoted is a literal copy of the Missouri Statute upon the same subject, and the Supreme Court of Missouri has construed that Statute, or an act containing the same provision, in the case of *Wood* v. *Phelps, &c. supra*. In that case three were appointed as a board of commissioners in an act to locate a seat of justice. The act provided that a majority of the commissioners should be sufficient to make a location, but in case one of them failed to act, it should be lawful for the County Court to fill the vacancy, and this last provision is the same as the Kansas Statute heretofore quoted. Only *two qualified*, and they made the location which the Court held void in the following language:

"Three Commissioners, were appointed, in or-
"der that each of them might have the benefit of
"the advice and information of the others, and it
"was supposed that their associate counsel and
"judgment would produce a wise and more satis-
"factory result than if only one or two acted.

"Where a public act requiring the exercise of "judgment is to be performed by three or more "commissioners appointed in a Statute, *all of them* "*must meet and confer*, though the question may be "determined by the opinion of a majority unless "concurrence of all is required.

"When *all are present* and *acting*, *two* may de- "cide; but *two* cannot act without at least consult- "ing the third. * * * *

"The Statute appointing these commissioners "permits a majority of them to locate the county "seat, but it contemplates that all should meet and "confer, for it expressly provides that in case one "or more of them should fail to act, the county "court of the county in which the commissioner "resided should supply his place by appointing "another."

In the case at bar, commissioner Wood being disqualified by reason of not being a freeholder, and having acted at the appraisement, the verdict stands as though there had been only two commissioners appointed, and for that reason the appraisement is void.

VII.

The defendant will seek to resist the attack upon the constitutionality of this Statute in question, upon the ground of a previous decision of the Supreme Court of Kansas (*Mo. River, Fort Scott & Gulf R. R. Co.* v. *Shepard*, 9 Kansas, 647), holding that Statute constitutional.

But we submit, that by the universal rule of decision, this Court will not follow the adjudications of the higher State Court, though affecting *titles* to *land*, where a federal question is involved, or where the interpretation of the State Court conflicts with fundamental principles of justice and common rights.

Murray v. *Gibson*, 15 How. pp. 421–*425*.
Walker v. *State Harbor Commissioners*, 17 Wall. 648.
Illinois State Railroad Tax Cases, 92 W. S. pp. 575–*617*.

For the foregoing reasons, and well established legal principles supporting them, we submit that the judgment of the lower Court should be reversed.

ALBERT YOUNG,
Counsel for Plaintiffs.

FILED.
MAR 22 1889
JAMES H. McKENNEY,
CLERK.

IN THE
Supreme Court of the U. S.

OCTOBER TERM, 1888.

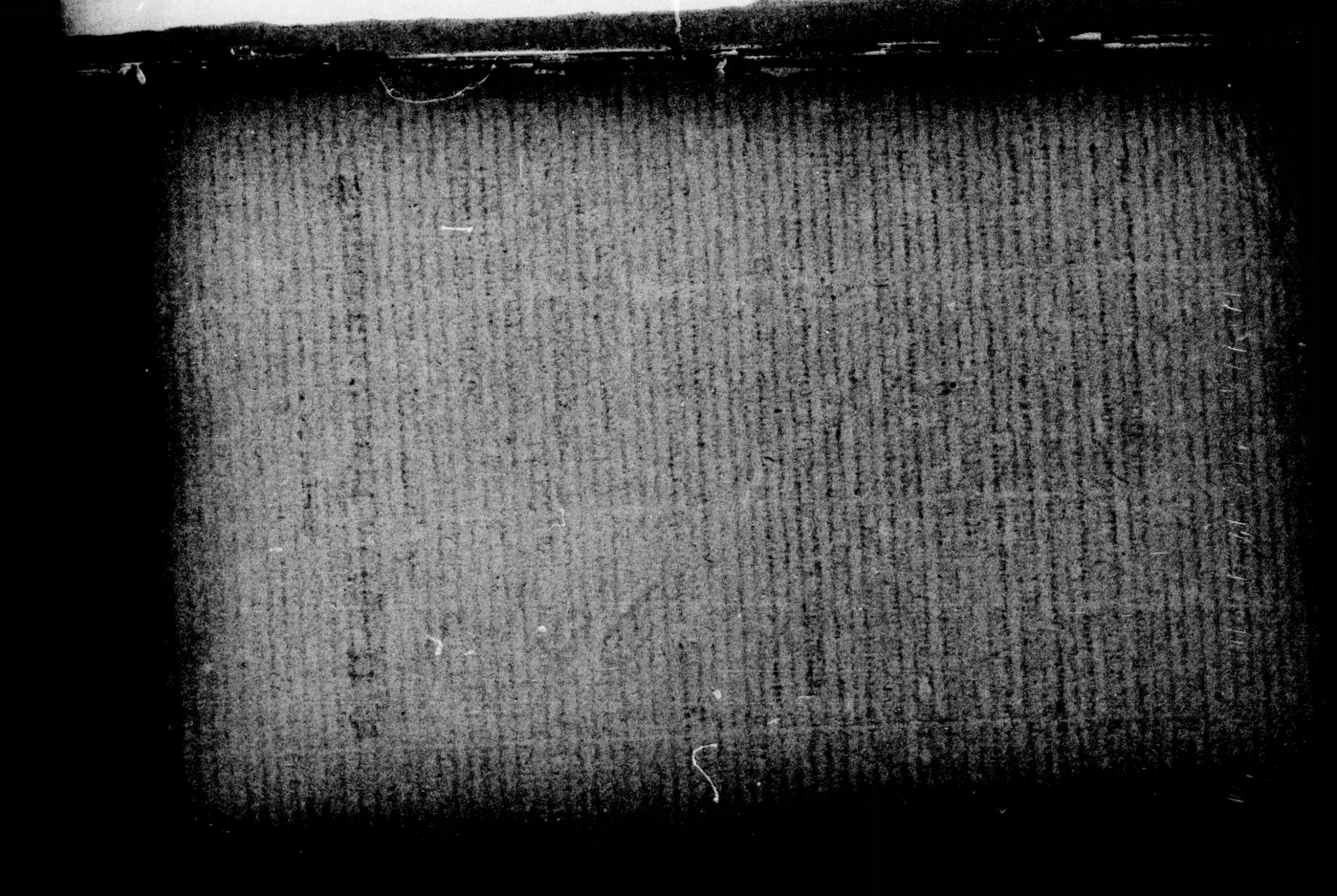
GEORGE D. HULING and
LUCY E. HULING,
Plaintiffs in Error,
vs.
THE KANSAS VALLEY RY. &
IMPROVEMENT CO.,
Defendant in Error.

No. 230.

In error to the Circuit Court of the United States for the District of Kansas.

SUPPLEMENTARY BRIEF FOR PLAINTIFFS IN ERROR.

ALBERT YOUNG and
EPPA HUNTON,
Counsel for Plaintiffs in Error.



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We beg leave to submit the following additional authorities on the right of plaintiffs in error to show by testimony *aliunde* that one of the commissioners appointed by Judge Wagstaff to condemn land in Wyandotte County was not a free holder of said county, and by reason of this the condemnation in question is void and furnishes no defence to this suit.

It will not be questioned that the Hon. W. R. Wagstaff, though judge of a court of general jurisdiction, in this matter of appointing commissioners to condemn land for railroad pusposes was exercising a power conferred by statute in derogation of the common law and that this statutory authority had to be exercised with

the strictest regard to the requirements of the statute. That so far as this proceeding is concerned it was a court of inferior and limited jurisdiction.

It is maintained in cases of this sort that the court has no power to do more or less than the statute authorizes. He had no power to appoint any person a member of the Board of Commissioners except free holders resident of the county. That the appointment of any one but free holders, if apparent on his order would vitiate the appointment, and the acts of commissioners would be void.

It is maintained further, if the order recites that they were all free holders proof may be introduced *aliunde* to show that one or more were not free holders and thus vitiate the condemnation.

In Smith's Leading Cases, 8th American edition, vol. 1, part 2, page 1120 in notes to Crepps vs. Durden, the doctrine is laid down as follows: "We may consequently infer that when the powers of an inferior court are limited as it regards the cause of action, its locality or amount the restriction cannot be evaded by a finding or allegation which is contrary to the truth, and if such averment is made of record it may be disproved and the judgment set aside collaterally." He cites in corroboration of this principle

Harriott vs. Van Cott, 5 Hill 285.
Brown vs. Mellor, 6 Hill 496.
Willins vs. Wheeler, 28 Bart 669.

"And the principle is the same when a court whose jurisdiction is confined to one class of persons attempts to exercise it over another."

Perkin vs. Proctor, 3 Wils. 382.

In re Baker, 2 H. and N. 219, 234, 240. On next page of same book it is said: "In like manner a conviction under authority to try and punish a particular class of workmen summarily may be set aside by proof that the accused does not belong to that class, but not that he did not commit the offense. So a court-martial cannot under ordinary circumstances subject a citizen to the pains and penalties of martial law by deciding that he is a soldier."

Smith vs. Shaw, 12 Johns 257.
Wise vs. Withers, 3 Cr. 331.
Bunberry vs. Fuller, 9 Exch. 111, 143 note.
Regina vs. Bolton, 1 Q. B. 66.

By parity of reason the judge in this case could not under authority to appoint free holders appoint any one not a free holder, and the fact that he describes them as free holders may be disproved by evidence outside the record, and when established by this evidence the appointment is void for want of authority, and action under it is void.

Willes vs. Sproule, 13 Kansas R., 264.

This was an action of trespass *quare clausum fregit* the defendant justified under proceedings to condemn for County Road. The court says:

"After a careful examination of the question we have come to the conclusion that whenever the records and files of the Board of County Commissioners purporting to establish a county road are regular in form and contain everything which the statutes require to be preserved and kept in such cases such record and files will prove *prima facie* at least that such road has been legally established and had a legal existence, and there-

fore there is no necessity in the first instance to resort to evidence *aliunde* to prove the existence of the road. Such ought to be the law, and especially so where the existence of the road is attacked collaterally as in this case. * * *

"Of course we do not wish to be understood as deciding that the records of the County Commissioners are more than *prima facie* evidence of the establishment of the road; for we suppose that generally, if not always jurisdictional facts may be proved or disproved by evidence *aliunde* for the purpose of sustaining or invalidating the proceedings of a tribunal of special and limited jurisdiction such as a board of county commissioners is."

The record of a court of a sister State is placed upon the same footing as the record of a court of limited or special power.

In Noyes vs. Butler, 6 Barb., N. Y. 616 the court says:

"The jurisdiction of the court of a sister State may be inquired into although the record of the judgment states facts giving it jurisdiction. The record is never conclusive as to a recital or statement of jurisdictional facts and the defendant is always at liberty when a suit is brought in this State on a judgment of a court of a sister State, to show a want of jurisdiction, although the record avers the contrary. 5 Wend., 158; 6 Id., 452; 4 Cowen, 294. No court can acquire jurisdiction by a false assertion of facts on which jurisdiction depends. 5 Hill, 168, Bronson J. But the record of a judgment of a court of a sister State, which states facts giving the court jurisdiction will be received as *prima facie* evidence of such facts. 6 Wend., 452, 3; 5 Id., 148. The defendant, however, is not estopped by such statement in the record from contradicting and disprov-

ing it. Id. The defendant is always at liberty to show the court had not jurisdiction of the subject-matter of the suit or of his person by the personal service of process or by his appearance in the suit either in person or by attorney." Harrington vs. The People, 6 Barb, N. Y., p. 610. "If a court whether of general or limited jurisdiction undertakes to hold cognizance of a cause without having jurisdiction both of the person and the subject-matter the proceedings will be utterly void. And in the case of a limited or special jurisdiction the magistrate or party attempting to enforce a proceeding founded on any judgment, sentence, or conviction in such case becomes a trespasser. 19 John, 40, 41; 3 Cow., 209; 2 Cow. & Hill's notes, 990. The jurisdiction of a court whether of general or limited jurisdiction may be inquired into, although the record of the judgment states facts giving it jurisdiction. No court or officer can acquire jurisdiction by the mere assertion of it, or by falsely alleging the existence of facts on which jurisdiction depends. 5 Hill, 168, per Bronson, J.; 5 Wend., 158; 6 Id., 452. The statement or recital in a record of an inferior court or tribunal of facts constituting jurisdiction may be received as *prima facie* evidence of such facts."

Cooley in his Constitutional Limitations, page 503, 5th edition says:

"But in a case of a court of special jurisdiction and limited authority it is permitted to go still further and to show want of jurisdiction even in opposition to the recitals contained in the record."

Webster vs. Reid, 11 How. 437.
Sheldon vs. Wright, 5 N.Y. 497 and 434.

In Oliphant vs. Com'rs, 18 Kansas 385, 395, the court says:

"Where neither upon the papers nor proceedings of the County Board does it affirmatively appear that at least twelve of petitioners were 'house holders' resident of the vicinity of such road and the proceedings are attacked directly by petition in error the defect is fatal and must be set aside as void. When attacked collaterally the fact that such petitioners are qualified house holders may be shown by testimony *aliunde* the record."

If the fact may be thus proved to show that the proceeding is legal, the opposite fact may be proved in like manner to show the action of the tribunal was usurpation.

In Windsor vs. McVeigh 93, U. S., 275, and 282 Mr. Justice Field delivering the opinion of the court says, page 282.

"Though the court may possess jurisdiction of a cause and of the parties it is still limited in its modes of procedure and in the character and extent of its judgments. It must act judicially in all things and cannot then transcend the power conferred by law."

Ex parte Lang 18 Wal.176.

In Bigelow vs. Forest, 9 Wal. 339, Mr. Justice Strong delivering the opinion of the court says:

"Under the confiscation act court had no power to order sale which should confer on purchaser rights outlasting the life of Forest. Had it done so, it would have transcended its jurisdiction."

See also Suydam & Wychoff vs. Keys, 13 Johns. 445.

Alex. & Fred. Ry. vs. Alex. & Wash. R. R., 75 Va.

Suppose the judge in this case had appointed three commissioners who resided in London, and owned no

real estate in America and recited in his order that they were resident freeholders of the county of Wyandotte in the state of Kansas. Can it be pretended that their condemnation would have divested the title of plaintiff in error under this special act of Kansas?

It must be borne in mind that this law makes no provision for notice, constructive or otherwise, to be given of the application for appointment of commissioners. No opportunity is given to object to anything the judge may do, no appeal from his order is authorized, and if not allowed to attack this action of the judge collaterally the grossest injustice may be done without the semblance of opportunity to resist or avoid it.

EPPA HUNTON,
Counsel for Plaintiff in Error.

Supreme Court, U. S.
MAR
JAMES H. MCKENNEY,
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OCTOBER TERM, 1888.

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No. 230.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KANSAS.

Statement and Brief for the Defendant in Error.

GEO. W. McCRARY,
WALLACE PRATT,
Attorneys for Defendant in Error.

KANSAS CITY, MO.
PANTAGRAPH JOB OFFICE, SHEIDLEY BUILDING, NINTH AND MAIN.
1889.

IN THE

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Statement and Brief for the Defendant in Error.

STATEMENT.

The statement submitted by counsel for Plaintiffs in Error, while for the most part satisfactory, does not, we think, fully set forth all the material parts and sections of the statute of Kansas, proper to be considered by the court in determining the question of the validity of the condemnation proceedings under which Defendant in Error claims. These are as follows:

Compiled laws of Kansas of 1885; Chapter 23, Article 9.

APPROPRIATION OF LANDS FOR THE USE OF RAILWAY AND OTHER CORPORATIONS.

"(1208) § 81. APPLICATION, HOW MADE. SEC-"TION 81. Any duly chartered and organized rail-"way corporation may apply to the board of "county commissioners of any county through "which such corporation proposes to constuct its "road, to lay off, along the line of such proposed "railroad, as located by such company, a route "for such proposed railroad, not exceeding one "hundred feet in width, except for the purposes of "cuttings and embankments it shall be necessary to "take more for the proper constuction and security "of the road, through as much of said county as may "be desired by such company; and also such land as "may be deemed necessary for sidetracks, depots "and workshops, and water stations, materials for "construction, except timber, a right of way over "adjacent lands sufficient to enable such company "to construct and repair its roads and stations, and "a right to conduct water by acqueducts, and a "right of making proper drains.

"(1209) § 82. ROUTE, SIDE TRACKS, ETC., REPORT. "SEC. 82. Upon application being so made in writing, "such board of county commissioners shall forth-"with proceed to lay off such route, side tracks, etc., "for such distance through their said county as may "be so desired, and of such width, within the limits "aforesaid, and upon such location, as may be de-"sired by such corporation, having the same care-"fully surveyed, and ascertaining carefully the "quantity of land necessary for such purposes out "of each quarter-section or other lot of land "through which said route, side tracks, etc., is so "located, and appraise the value of such portion of

"any such quarter-section or other lot of land, "and assess the damages thereto; and when such "commissioners shall ascertain that such portion of "such quarter-section or lot belongs to different "owners, they shall appraise the value and assess "the damages of each such owner's interest; all "which doings the board of commissioners shall "embody in a written report, and file in the of- "fice of the county clerk of such county.

"(1210) § 83. COPY OF REPORT; DUTIES OF "TREASURER. SEC. 83. Such county clerk shall "forthwith prepare and file in the office of the treas- "urer of such county, a copy of such report; and if "such company shall cause to be paid to such treas- "urer the amount in full of such appraisement, with- "in ninety days of the time of filing such copy in "such treasurer's office, such treasurer shall there- "upon certify such fact upon the copy of the report, "under his hand and seal of office, and shall, upon "demand of the persons severally entitled thereto, "pay over the amounts of such fund to such persons "as shall be respectively entitled thereto.

"(1211) § 84. RIGHT TO OCCUPY LAND: PERPET- "UAL USE. SEC. 84. If such company shall cause "the copy of the report, so certified, to be, within "ten days after such certifying, filed and recorded "in the office of the register of deeds for such "county, it shall have the right to occupy the land "so embraced within such route, for the purposes "necessary to the construction and use of its road; "and to such portions of such road over which a "railroad shall be actually constructed within such "time, the perpetual use of such lands shall vest in "such company, its successors and assigns, for the "use of the railroad, as soon as so much of such "railroad shall have been constructed fit for use.

"(1213) § 86. NOTICE; DAMAGES; APPEAL. SEC. 86. "Before any board of county commissioners shall "proceed to lay off any railroad route, as herein "provided, notice of the time when the same shall "be commenced shall be given, by publication, thirty

"days before the time fixed, in some newspaper "published in such county, or if none be published "therein, then in one of general circulation in the "county wherein such railway is to be laid off; and "an appeal shall be had from the determination of "the board of county commissioners as to the value "of the land, crops, buildings and other improve-"ments on said land, and for all other damages sus-"tained by such person or persons by reason of such "right of way so appropriated, in the same manner "as appeals are granted from the judgment of a jus-"tice of the peace to the district court; and said ap-"peal and all subsequent proceedings shall only af-"fect the amount of compensation to be allowed, "but shall not delay the prosecution of the work on "said railroad, upon said company paying or depos-"iting the amount so assessed by said commis-"sioners with the county treasurer of the county "within which the said lands are situated; and upon "the payment or deposit, as aforesaid, of the "amount so assessed by said commissioners, and "upon said company executing a bond, with "sufficient security, to be approved by the "county clerk, to pay all damages and cost which "said company may be adjudged to pay by said dis-"trict court, said company may, notwithstanding "said appeal, take possession of and use the said "land and construct its road over the same. [Sec-"tion 86, as amended, L. 1870, ch. 74, § 1, took effect "March 24, 1870.]

"(1214) § 87. DISTRICT JUDGE MAY BE APPLIED "TO. SEC. 87. That any railway corporation, in-"stead of applying to the board of county commis-"sioners as hereinbefore provided, or any person or "persons through whose land or premises any rail-"road has been or is being constructed, may apply "to the judge of the district court of the county "through which any railroad is, is to be built, "for the appointment of three commissioners to "make the appraisement and assessment of dam-"ages instead of the county commissioners; said

"commissioners shall be freeholders and residents "of the county through which such railroad is, or is "to be built. Such appointment shall be made by "the district judge on the written application of the "corporation, or the person or persons, their agent "or attorney. The appointment shall be made in "writing, under the hand of the judge, and deliv- "ered to the party applying therefor. The applica- "tion for and certificate of appointment shall be "recorded in the office of the register of deeds of the "proper county. In case any vacancy occurs, or "any such commissioner or commissioners refuse to "serve on such board, the district judge shall ap- "point in the manner herein provided, some other "person or persons, having the qualifications herein "provided. Such commissioners shall be sworn to "honestly and faithfully discharge their duties as "such commissioners, and they shall do and perform "all things in the manner, and under the same reg- "ulations and restrictions as are provided in case "such duties were performed by the county commis- "sioners, and the subsequent and other proceedings, including appeal, shall be done and performed in "the same manner; and the railroad company shall "pay all costs accruing under any application un- "der this section. [Section 87, as amended, L. 1870, ch. 74, §2; took effect March 24, 1870.]

Chapter 104, same statutes, entitled "An Act Concerning the Construction of Statutes," reads as follows:

"(6067) SECTION 1. * * * * * "Fourth. Words giving a joint authority to three "or more public officers or other persons, shall be "construed as giving such authority to a majority "of them, unless it be otherwise expressed in the "act giving the authority."

BRIEF.

We shall maintain:

First: That the condemnation proceedings were in strict accordance with the statute of Kansas as upheld and construed by the Supreme Court of that State.

Second: That the said statute of Kansas is not in contravention of the 14th amendment to the constitution of the United States.

Third: That it was not competent for the Plaintiffs in this collateral proceeding to contradict the finding of the judge of the District Court of Wyandotte County, Kan., in the condemnation proceedings that the commissioners were "freeholders and residents of Wyandotte County, Kan."

Fourth: That the statute of Kansas respecting the condemnation of land for railroad purposes, having been repeatedly approved by the Supreme Court of that State, and having been for many years upheld and enforced, this Court will, for the sake of harmony, and to avoid confusion, even if the question were doubtful, lean towards an agreement with the State courts.

FIRST PROPOSITION.

The Condemnation Proceedings Were in Strict Accordance With the Statute of Kansas as Upheld and Construed by the Supreme Court of that State.

The act under which the condemnation proceedings were had, was originally enacted in 1864, and was materially amended in 1870. It has been upheld and enforced in numerous cases which have arisen in the courts of Kansas. It is not necessary to cite all the cases, but the following are referred to:

Gulf R. R. Co. v. *Shepard*, 9 Kansas, 647.
Challiss v. *A. T. & S. F. R. R. Co.*, 16 Kansas, 117.
The Memphis, etc., R. R. Co., v. *The Parsons Town Co.*, 26 Kansas, 503.
Central Branch, etc., R. R. Co. v. *A. T. & S. F. R. R. Co.*, 26 Kansas, 669.
Central Branch, etc., R. R. Co. v. *A T. & S. F. R. R. Co.*, 28 Kansas, 453.

The attention of the Court is especially invited to the case of the *Gulf R. R. Co.* v. *Shepard, supra*, where the identical questions raised by counsel in the present case were fully considered by the Supreme Court of Kansas. It was there contended by counsel that the notice prescribed by the statute was void for the reason "that it is addressed to "no person; that it fixes no time or place for the

"commissioners to meet, and has not a single char-"acteristic of the legal idea of notice." (See page 650).

Answering this contention the Court said, (page 654): "Is the law unconstitutional, because pro-"viding for no notice? If the law was silent as to "notice, and an attempt was made by it to divest "one on his property without any pretense of no-"tice, its unconstitutionality would be undisputed. "A man cannot be deprived of his property without "due process of law. This process of law implies "notice; not necessarily actual, personal notice, "but notice, such that there is a reasonable prob-"ability of the party's receiving it."

And after quoting from the opinion of Denio, Judge, in the matter of the *Empire City Bank*, 18 N. Y., 199, to the effect that where the legislature has prescribed a notice by which it is reasonably probable that the party proceeded against would be apprised of what is going on against him, and opportunity offered him to defend, the courts have not the power to pronounce the proceeding illegal, the Supreme Court of Kansas proceeds:

"Article 9 is not obnoxious to the charge of attempting to divest property without notice. It attempts to provide for notice. It requires notice, gives opportunity to be heard, and defend, and right of appeal from the decision of the commissioners to the District Court. The real objection, therefore, is that the notice provided for is insufficient. Sec. 86 of this article reads, that, 'before any board of county commissioners shall proceed to lay off any railroad route as herein provided, notice of the

time when the same shall be commenced shall be given by publication, thirty days before the time fixed, in some newspaper published in such county,' etc. This does not contemplate personal notice. Nor is this essential. As we understand the learned counsel for the Defendant in Error they conceded this. The statutes are full of instances of constructive notice, as in case of publication against non-residents, in attachment suits, foreclosures of mortgages, etc.; or in cases of changes in the valuation of real estate by the boards of equalization, or, in the matter of street improvements in cities or opening roads in the counties." Citing authorities.

And again the Court says :

"The legislature has provided for this notice. Whether we think a fuller and more specific one ought to be provided, or not, we must sustain this unless it conflicts with the constitution and is void."

The Court proceeds to call attention to the fact that the line of railroad must be located before the condemnation proceedings are instituted. The filing of the map and profile makes more public what has been already previously done. That the location of a line of railroad is not a thing hid under a bushel, or done in a corner, but is a matter of public notoriety, and that all the circumstances considered, "it is reasonably probable that persons "to be affected by the assessment will be notified "by the publication ; fully as probable as in other "cases of constructive notice."

And again : "Perhaps this legislation is not as "full as it ought to be. Perhaps other safeguards

"should be thrown around the property of the citi-
"zens. Be this as it may—and it is a question for
"the law-makers—we cannot pronounce the legisla-
"tion void." Citing *Owners of Grounds, etc.*, v. *Mayor of Albany*, 15 Wend, 374.

The court therefore held the statute valid and the notice sufficient and confirmed the validity of the condemnation proceedings which were attacked in that case.

The general question of the validity of the condemnation statute was again carefully and fully considered by the same court in *Central Branch R. R. Co.* v. *A. T. & S. F. R. R. Co. supra*, and it was there again held that the statute was valid. The opinion in that case, as well as that in the Shepard case, was delivered by Brewer, Judge, and settles completely the law of the present case so far as the State courts of Kansas are concerned.

Inasmnch as this court uniformly follows the decisions of the State Courts in the construction of their own constitutions and statutes, it would seem scarcely necessary to add authorities in support of the soundness of these decisions of the Supreme Court of Kansas. Nevertheless, the counsel for Plaintiffs in Error have seen fit to argue at some length in their brief the question of the sufficiency of the notice in the condemnation proceedings under the statute of Kansas. It is enough for us to show, as we have done, that the question is not an open one, but we add that if it were, the decisions of

the Supreme Court of the State of Kansas would be found to be in accordance with the great weight of authority. It is insisted that the notice is bad because it is addressed to no person by name.

Lewis on Eminent Domain, section 367, says:

"In regard to the kind of notice which will satisfy the requirements of the constitution in proceedings to take land for public use, the authorities almost universally hold that notice by publication or by posting is sufficient, even with respect to persons residing within the jurisdiction where the proceedings are had. The same authorities hold, that, unless required by statute, the notice need not name the owners or persons interested in the land sought to be condemned, but that it is sufficient if the notice describes the land, and indicates the nature of the proceeding and specifies the time when, and the place where, the persons interested must appear to protect their rights."

The authorities cited in support of this doctrine are very numerous and will be found in notes 1 and 2 to the section above cited.

It is also contended by counsel that the notice contains no description of any part of the tract of land sought to be taken. This is not true in point of fact, even if it would constitute a valid objection to the notice in point of law.

By reference to the notice, (Record page 18) it will be seen that it is addressed "to all persons own-"ing lands on the line of the railroad of the Kaw "Valley Railway and Improvement Company as the "same is now or may be located through Section twenty-three (23), township eleven (11) of range "twenty-five (25), in the county of Wyandotte and

"State of Kansas," so that the very property in controversy in this suit is definitely described in the notice.

It is further urged that the notice fails to designate any place where said commissioners would meet, or any particular time except on Monday, May 22, 1882.

The place is sufficiently designated by the statement in the notice, that the commissioners will proceed to lay off a route for said railroad through said section. They must necessarily assemble on the premises for that purpose, and it may be added that no better place could be imagined. The commissioners, in order to lay off the line and perform the other duties required of them by law, go upon the premises and view the same. The theory of the statute is that the owner of the land, and all persons interested, will have then and there the best opportunity of appearing before them and pointing out the nature and extent of their damages. The notice is intended to apprise the owner and others interested of the time when the commissioners will appear upon the premises in the discharge of their duties under the statute. The statute does not require that they should state the hour of the day at which they will commence the discharge of these duties, nor is this necessary.

It is not claimed by the counsel for Plaintiffs in Error, that the condemnation proceedings in question were defective in any respect, except in the matter of notice. It is therefore not necessary

to say more under this head. We may however add that the record clearly shows that the statute was followed with great strictness and that all of its requirements were complied with.

SECOND PROPOSITION.

That the Said Statute of Kansas Providing for Condemnation Proceedings is not in Contravention of the 14th Amendment to the Constitution of the United States.

It is contended by counsel for Plaintiffs in Error that the proceeding provided for by the statute of Kansas, to be observed in the condemnation of land for railroad purposes, is unconstitutional for the reason that it fails to provide for proper or reasonable notice to the landholder, and is therefore not "due process of law."

It may be conceded that the State is bound to provide for notice to, and opportunity to be heard by, the land owner in such cases. Our contention is that the State may determine and prescribe the kind of notice and the mode in which it is to be given. It is not necessary that there should be personal notice even to persons residing within the jurisdiction, *much less to those who reside beyond the jurisdiction, as did the Plaintiffs in this case.*

Secombe v. *R. R. Co.* 23 Wallace, 108.
Scott et al v. *City of Toledo,* Ry. and Corporation Law Journal, vol. 4, page 532.

Cooley's Constitutional Limitations. 5th Ed. page 435.

Murray's Lessee et al. v. *Hoboken Land and Improvement Co.* 18 Howard 272.

Pearson v. *Yewdall*, 95 U. S. 294.

Pennoyer v. *Neff*, 95 U. S. 722, 742, 743.

Boom Co. v. *Patterson*, 98 U. S. 403-406.

Spencer v. *Merchant*, 125 U. S. 345, 355-356.

Hagar v. *Reclamation District No.* 108, 111 U. S. 701.

Davidson v. *New Orleans*, 96 U. S. 97.

The rule for which we contend is thus clearly stated by Jackson, Circuit J., in his elaborate and able opinion in the recent case of *Scott et al. v. City of Toledo, supra.*

"The legislature may prescribe the *kind of notice and the mode in which it shall be given*, but it cannot dispense with all notice. The owner must in some form, in some tribunal, or before some official authorized to correct errors or mistakes, have an opportunity afforded him to be heard in respect to the proceeding under which his property is to be taken or burdened, before the tax or assessment becomes final or effectual, in order to constitute such procedure, 'due process of law.'"

That case arose under a statute of Ohio providing for the assessment of benefits growing out of street improvements upon the property adjacent to the improvement, and section 2278 of the statute, which is quoted by Jackson, J., (page 539) provided for the publication of a notice "in some newspaper "of general circulation in the corporation, that

"such assessment has been made, and that the same "is on file in the office of the clerk for the inspec- "tion and examination of persons interested there- "in."

This notice, as will be seen, was much less specific and definite than that provided by the Kansas statute now under consideration. Nevertheless, the learned judge, in delivering the opinion, declared:

"If the common council in the present case had proceeded under Sec. 2277, then the notice and opportunity to be heard, as provided under sections 2278, 2279 and 2280 would have been in conformity to 'due process of law.'"

While holding that the notice provided for by the Ohio statute was entirely sufficient, and would have been in conformity to "due process of law," if it has been given, the Court declared the proceedings in that case void for the reason, as appears in the opinion, that the City Council had under the statute the option of giving the notice or refusing to do so, and having exercised the authority of making the assessment without giving the notice, it was invalid.

In *Secombe* v. *R. R. Co.*, *supra*, the question was distinctly made as to the validity of the statute of Minnesota providing for condemnation proceedings and as to the sufficiency of the notice provided by that statute.

The constitution of Minnesota provides, using substantially the same words as the 14th amend-

ment, that "no person shall be deprived of life, lib-"erty or property without due process of law." The statute which was assailed in that case is set out in full on pages 111 and 112, 23d Wallace, and it provided with respect to notice, that, if the owners are non-residents, "then said notice shall be published "in the nearest newspaper to where said land is "situated, at least four weeks before making such "appraisement."

This Court, however, did not see fit to examine very minutely the character of the notice required to be given, holding as it did, that that was a question for the State alone to determine.

We quote from the opinion:

"It is no longer an open question in this country that the mode of exercising the right of eminent domain, in the absence of any provision in the organic law prescribing a contrary course, is within the discretion of the legislature. There is no limitation upon the power of the legislature in this respect, if the purpose be a public one, and just compensation be paid or tendered to the owner for the property taken."

In determining what is due process of law within the meaning of the 14th amendment, it is necessary to consider the character of the proceeding in which the question may arise. Thus it is said by Judge Cooley in his work on constitutional limitations, 5th Ed., page 436:

"In judicial proceedings the law of the land requires a hearing before condemnation, and judgment before dispossession; but when property is appropriated by the government to public uses, or the legislature interferes to give direction to its

title through remedial statutes, different considerations from those which regard the controversies between man and man must prevail, different proceedings are required, and we have only to see whether the interference can be justified by the established rules applicable to the special case. Due process in each particular case means, such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs."

And again, page 437:

"The right of eminent domain and the right of taxation will also be discussed separately, and it will appear that under each the law of the land sanctions divesting individuals of their property against their will and by somewhat summary proceedings. In every government there is inherent authority to appropriate the property of the citizen for the necessities of the State, and constitutional provisions do not confer the power, though they generally surround it with safeguards to prevent abuse. The restraints are, that when specific property is taken, a pecuniary compensation, agreed upon or determined by judicial inquiry, must be paid," etc.

In *Hagar* v. *Reclamation District, supra*, this Court quoted, with approval, from the concurring opinion of Mr. Justice Bradley in *Davidson* v. *New Orleans*, as follows:

"In judging what is due process of law, respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or some of these; and if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to

be arbitrary, oppressive and unjust it may be declared not to be due process of law."

In *Murray's Lessee et al.*, v. *Hoboken Land and Improvement Co.*, *supra*, this Court held that a distress warrant, issued by the solicitor of the treasury under the act of Congress of May 15, 1820, for the enforcement of a claim of the United States, although issued without any notice, and without any hearing, was not in violation of that provision of the constitution which prohibits a citizen fron being deprived of his liberty or property without due process of law. It was held to be a proper proceeding in the particular case, and under the circumstances, and justified by usage, and therefore due process of law.

Spencer v. *Merchant*, *supra*, is very much in point. That case involved the constitutionality of a statute of the State of New York providing for the taking of private property for street purposes in the City of Brooklyn. It authorized the Supreme Court of Kings county to appoint three commissioners with power to lay out the street in question, and to take the necessary lands for that purpose. The commissioners were required to give public notice in two or more newspapers of the county "at least twenty days before meeting for "that purpose, of their intention to proceed to make "the award and assessment required by this act, "and of the time when and the place where they "will meet for that purpose, at which meeting all

"persons interested may appear and be heard in re-"lation to the said award and assessment."

It was held upon full consideration by this Court, as well as by the Court of Appeals of New York, that the proceeding here provided for was not the taking of property without due process of law in violation of the 14th amendment to the Constitution of the United States. This Court at pages 355 and 356 said :

"If the legislature provides for notice to and hearing of each proprietor, *at some stage of the proceedings*, upon the question what proportion of the tax shall be assessed upon his land, there is no taking of his property without due process of law."

In *Pearson* v. *Yewdall*, *supra*, this Court said, page 296 :

"In the act of the general assembly of Pennsylvania, now under consideration, ample provision is made for an inquiry as to damages before a competent court, and for a review of the proceedings of the court of original jurisdiction, upon appeal to the highest court of the State. This is due process of law, within the meaning of that term as used in the Federal Constitution."

It is plain that the same can be said of the act of the legislature of Kansas now under consideration, for it provides, not only for an inquiry as to damages, *but also for an appeal.*

In *Pennoyer* v. *Neff*, *supra*, this court said, page 722 :

"As a consequence, every State has the power to determine for itself the civil *status* and capacities of its inhabitants ; to prescribe the subjects upon which they may contract, the forms and solemni-

ties with which their contracts shall be executed, the rights and obligations arising from them, and the mode in which their validity shall be determined, and their obligations enforced; *and also to regulate the manner and conditions upon which property situated within such territory, both personal and real, may be acquired, enjoyed and transferred.*"

And in the same case, page 741, this Court quotes, with approval, from *Galpin* v. *Page*, 3 Sawyer, 93, these words:

"Where a party has property in a State, and resides elsewhere, his property is justly subject to all valid claims that may exist against him there; but beyond this, due process of law would require appearance or personal service before the defendant could be personally bound by any judgment rendered."

And on page 743 the Court quotes from the case of *Happy* v. *Mosher*, 48 N. Y., 313, with approval, the following definition of due process of law:

"It need not be a legal proceeding according to the course of the common law, neither must there be personal notice to the party whose property is in question. It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against, will be apprised of what is going on against him, and an opportunity offered him to defend."

That the notice required by the Kansas statute is such as to make it reasonably probable that the land owner will be apprised of the proceeding is too plain for argument. As was stated by the Supreme Court of Kansas in *Gulf R. R. Co.* v. *Shepard*, 9th Kansas, 647, already cited, the proceeding

is one of general notoriety, and while the notice required by the statute is of itself sufficient to bind a non-resident land owner, it is proper to observe that the other proceedings required by the statute are of such a character as to make it almost certain that all persons interested will be notified.

In the first place the application is made to the district judge for the appointment of commissioners (Sec. 87). As soon as the appointment is made, the application therefor and certificate of appointment are to be recorded in the office of the Register of Deeds of the proper county, (same Sec). This is the office in which all matters affecting the title to lands are to be found of record, and there would seem to be little room for doubt that the legislature might provide that this alone should be taken as notice to all persons interested.

This done, the notice prescribed by Sec. 86 is to be published, and after the commissioners have completed the discharge of their duties and made their report, an appeal is allowed to the District Court, where the whole matter may be tried *de novo.* (Sec. 86).

The report of the commissioners is to be in writing, and is to be filed in the office of County Clerk of the county, (Sec. 82). The clerk of the county is required to forthwith prepare and file in the office of the Treasurer of the county, a copy of such report. Besides, it is necessary before any proceedings for condemnation are instituted, that

the County Commissioners of the county shall lay off a route for the proposed railroad, not exceeding one hundred feet in width, through such county as may be desired by the railroad company. (Sections 81 and 82).

An inspection of the entire act will show that the proceedings, including the notice required to be published, constitute a proceeding so public and so notorious as almost of necessity to give full information to all persons concerned. At all events, it seems abundantly clear that the statute is not so fatally defective as that the proceedings under it should be set aside by this Court as in violation of the 14th amendment to the Constitution.

In this connection we call attention to the repeated decisions of this Court holding that a proceeding to ascertain damages in a case of this character is not a suit at law in the ordinary sense, but a mere inquest. Thus in *Boom Co.* v. *Patterson*, 98 U. S., page 406, which was a condemnation proceeding under a statute very similar to that now in question, this Court said :

"The proceeding in the present case before the commissioners appointed to appraise the land *was in the nature of an inquest to ascertain its value, and not a suit at law in the ordinary sense of those terms*, but when it was transferred to the District Court, by appeal from the award of the commissioners, it took, under the statute of the State, the form of a suit at law and was *thenceforth* subject to its ordinary rules and incidents."

And in *United States* v. *Jones*, 109 U. S., page 519, this Court, speaking of condemnation proceed-

ings instituted under an Act of Congress and by the United States, said:

"But there is no reason why the compensation to be made may not be ascertained by any appropriate tribunal capable of estimating the value of the property. There is nothing in the nature of the matter to be determined which calls for the establishment of any special tribunal by the appropriating power.

The proceeding for the ascertainment of the value of the property and consequent compensation to be made, *is merely an inquisition to establish a particular fact as a preliminary to the actual taking*; and it may be prosecuted before commissioners or special boards or the courts, with or without the intervention of a jury, as the legislative power may designate. All that is required is that it shall be conducted in some fair and just manner, with opportunity to the owners of the property to present evidence as to its value, and to be heard thereon. Whether the tribunal shall be created directly by an act of Congress, or one already established by the States shall be adopted for the occasion, is a mere matter of legislative discretion."

And again in *Garrison* v. *City of New York*, 21st Wallace, page 204, this Court, discussing another very similar statute, said:

"The proceeding to ascertain the benefits or losses which will accrue to an owner of property when taken for public use, and thus the compensation to be made to him, *is in the nature of an inquest on the part of the State, and is necessarily under her control.*"

THIRD PROPOSITION.

That it was not Competent for the Plaintiffs in this Collateral Proceeding to Contradict the Finding of the Judge of the District Court of Wyandotte County, Kansas, in the Condemnation Proceeding, that the Commissioners were "Freeholders and Residents of Wyandotte County, Kansas."

Under the statute of Kansas already quoted the filing of a written application by the railway corporation, or persons through whose land or premises the railroad has been or is being constructed, as provided by Sec. (1214), confers upon the Judge of the District Court jurisdiction to appoint commissioners "to make the appraisement and assess-"ment of damages," instead of the county commissioners and with power to perform all things in the manner and under the same regulations and restrictions as are prescribed in case such duties were performed by the county commissioners.

This is the plain import of the statute. It declares *inter alia* that: "Said commissioners shall be "freeholders and residents of the county through "which the railroad is, or is to be built. Such ap-"pointment shall be made by the District Judge on "the written application of the corporation or the "person or persons, their agent or attorney. The "appointment shall be made in writing under the "hand of the Judge and delivered to the party ap-"plying therefor. The application for and certifi-

"cate of appointment shall be recorded in the office "of the register of deeds for the proper county."

If a citation of authorities be necessary to show that under this statute the jurisdiction to make the appointment is conferred by the presentation of the written application or petition to the district judge, we would refer to the following cases:

Commissioners of Leavenworth Co. v. *Espen*, 12 Kas. 531.

Venard v. *Cross*, 8 Kas. 248.

Beebe v. *Sheidt et al*, 13 Ohio St. 406.

C. B. & Q. R. R. Co. v. *Chamberlain et al*, 84 Ill. 333.

State v. *Barlow*, 61 Iowa 572.

Bailey v. *McKane*, 92 Ill. 277.

The two Kansas cases above referred to arose upon the construction of the statute of that State in relation to roads and highways. General Statutes of Kansas, 1868, chap. 89. Compiled Laws of Kansas, 1885, chap. 89.

By reference to this statute it will be seen that it provides that applications for laying out roads shall be by petition to the board of county commissioners. It provides for the publication of a notice by advertisement, etc. It further provides, by Sec. 4, that at least six days' notice shall be given in writing to the owner or owners, or their agents if residing in the county, through whose land such road is proposed to be laid out and established, of

the time and place of meeting as specified in the notice of the commissioners.

The question discussed by the Supreme Court of Kansas in the first case cited was as to whether the proceedings for laying out a road under this statute were void for the want of the giving of the notice to resident land owners as prescribed by the section just cited, and it was held that the presentation of the petition, in the manner and form prescribed, *conferred upon the commissioners jurisdiction to lay out and construct the road*, and that the record of the commissioners showing the establishment of the road was conclusive when collaterally attacked, the notice required by Sec. 4 not being a jurisdictional matter.

In *Venard* v. *Cross*, *supra*, the court said:

"Prior to making this order the statute, in previous sections, provides for filing a petition, advertising notice thereof and giving of bond. *After the taking of these steps the county board acquires jurisdiction of the matter, and the right to proceed.*"

And again:

"If the land owners have received no notice as required by Sec. 4, unquestionably they have a good claim against the county for damages. Perhaps also they might under some circumstances contest the location and opening of the road."

And in *Commissioners of Leavenworth Co.* v. *Espen*, the court, after quoting from *Venard* v. *Cross*, say:

"Those views we reaffirm now. There are no peculiar circumstances in this case calling for the interference of a court of equity. It stands upon

the naked fact of a failure to give notice. That notice is not, we think, a jurisdictional one. The jurisdictional notice is given before the order appointing viewers."

Precisely the same question arose in Ohio, under a statute almost identical with that of Kansas, in the case of *Beebe* v. *Sheidt*, *supra*, and was decided in the same way. See also *Arnold* v. *Flattery*, 5 Ohio, 271.

It being clear that the filing of the written application by the railroad company under the statute of Kansas conferred upon the judge of the district court jurisdiction to appoint the commissioners, it follows that his subsequent action in the exercise of that jurisdiction, in the appointment of commissioners, will be presumed to be correct, and cannot be questioned in a collateral proceeding.

The Illinois cases above cited are in point upon this question. We cite also,

Cooper v. *Reynolds*. 10 Wallace, 308.
Comstock v. *Crawford*, 3 Wallace, 396.
Secombe v. *R. R. Co.*, 23 Wallace, 108-119.
State of Iowa v. *Berry*, 12 Iowa, 58-60.

An examination of the authorities will show that this doctrine applies as well to inferior tribunals, and to courts of limited and special jurisdiction, as to those of more general powers. Thus, in *Comstock* v. *Crawford*, *supra*, the doctrine was applied to the proceedings of a probate court in Wisconsin Territory, and it was held that "the jurisdic-

"tion existing, the subsequent action of the court "is the exercise of its judicial authority, and can "only be questioned upon appeal, the mode provided "by the law of the Territory for review of the "determinations of the court."

The question in that case was whether the appointment of an administrator by the probate court was lawful and whether the question could be raised in a collateral proceeding. It was contended that the appointment was extra judicial and void under the statute of the Territory, because the administration belonged to the public administrator by the very terms of the statute, but the court by Mr. Justice Field said in answer to this objection:

"It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of its proceedings, its action cannot be collaterally attacked for mere error or irregularity. The jurisdiction appearing, the same presumption of law arises that it was rightly exercised as prevails with reference to the action of a court of superior and general authority."

And after showing that the record recited the necessary jurisdictional facts the court said:

"Whether there was a widow of the deceased, or any next of kin, or creditor, who was a proper person to receive letters if he had applied for them, or whether there was any public administrator in office authorized or fit to take charge of the estate, or to which of the several parties it was meet that the administration should be intrusted, were matters for the consideration and determination of the court; and its action respecting them, however irregular, cannot be impeached collaterally."

The case of *Secombe* v. *R. R. Co.*, *supra*, like the present case, involved the question of the validity of proceedings for the condemnation of land for railroad purposes, and in that case this court fully recognized the doctrine that such proceedings cannot be collaterally attacked, except by showing want of jurisdiction. This court said at page 119:

"The judgment of condemnation in this case was rendered by a competent court, charged with a special statutory jurisdiction, and all the facts necessary to the exercise of this jurisdiction are shown to exist. A judgment thus obtained is no more subject to impeachment in a collateral proceeding than the judgment of any other court of exclusive jurisdiction."

Citing 1 Redfield on Railways, 5th edition, page 271.

Although the condemnation proceeding under the Kansas statute was not strictly speaking a suit *in rem*, it so far partook of the character of such a suit as to make the proceedings, as shown by the record, entirely valid, and the jurisdiction of the special tribunal over the subject matter complete. The proceedings having been in accordance with the statute, the jurisdiction, so far as the property within the domain of the special tribunal was concerned, was perfect.

Cooper v. *Reynolds*, *supra*.

Boswell's Lessee v. *Otis*, 9 Howard, 346.

Pennoyer v. *Neff*, *supra*.

Voorhees v. *Bank*, 10 Peters, 449.

Florentine v. *Walton*, 2 Wallace, 210.

Harvey v. *Tyler*, 2 Wallace, 328.

Parker v. *Overman*, 18 Howard, 137.

In *Cooper* v. *Reynolds*, this Court said :

"By jurisdiction over the subject matter is meant the nature of the cause of action and of the relief sought; and this is conferred by the sovereign authority which organizes the court, and is to be sought for in the general nature of its powers, or in authority specially conferred."

And again :

"Jurisdiction of the *res* is obtained by a seizure under process of the court, whereby it is held to abide such order as the court may make concerning it. The power to render the decree or judgment which the court may undertake to make in the particular cause, depends upon the nature and extent of the authority vested in it by law in regard to the subject matter of the cause."

In *Boswell's Lessee* v. *Otis*, *supra*, this Court said :

"When the record of a judgment is brought before the court, collaterally or otherwise, it is always proper to inquire whether the court rendering the judgment had jurisdiction. Jurisdiction is acquired in one of two modes; first, as against the person of the defendant by the service of process; or, secondly, by a procedure against the property of the defendant within the jurisdiction of the court. In the latter case the defendant is not personally bound by the judgment, beyond the property in question, and it is immaterial whether the proceeding against the property be by an attachment or bill in chancery. It must be substantially a proceeding *in rem*."

The other authorities cited are to the same purport.

And as to the judgment in proceedings *in rem* the most that can be claimed is that an inquiry may be gone into in collateral proceedings as to the authority of the tribunal to act, and whether the *res* was so situated as to be subject to the jurisdiction.

Rose v. *Himely*, 4 Cranch, 241.

Hudson v. *Guestier*, 6 Cranch, 285.

In the latter case, which involved the question of the validity of a decree of condemnation by a foreign court, this Court said:

"The judge must have had a right to dispose of every question which was made on behalf of the owner of the property, whether it related to his own jurisdiction, or arose out of the law of nations, or out of the French decrees, or in any other way; and, even if the reasons of his judgment should not appear to be satisfactory, it would be no reason for a foreign court to review his proceedings, or not to consider his sentence as conclusive on the property."

Again, we submit that the statute of Kansas under which we claim is a local statute involving a rule of property, and must, therefore, be followed here, and the construction given to it by the highest court of the State must be accepted.

Nichols v. *Levy*, 5 Wallace, 433, was a case involving the construction of a statute of Tennessee, which gave a court of that State jurisdiction to sub-

ject legal and equitable interests in real estate to the claims of creditors. The Supreme Court of that State had construed the act as embracing trusts. This Court, while of the opinion that the ruling of the State court was clearly erroneous, nevertheless followed it, and among other things said:

"The Supreme Court of the State decided, in the suits referred to, that this statute embraces trusts of real estate, and that it exempted the property in question from liability to the judgment creditors. There can be no doubt of the power of the legislature to pass the statute. Its wisdom and policy are considerations with which we have nothing to do. Being a local statute, and involving a rule of property, we adopt the construction which has been given to it by the highest judicial tribunal of the State."

Many other cases of similar import might be cited, but the doctrine is too well settled to require further citations.

Furthermore, upon this point we confidently submit, that *any objection to the validity of the condemnation proceedings, based upon the alleged fact that one of the commissioners was not a freeholder, was waived by the failure to raise it at some stage of that proceeding.*

This follows inevitably from another proposition which we have already discussed and shown to be sound, viz.: that the notice given under the statute was sufficient to bind all persons interested in the land now in controversy. This being true, the Plaintiffs in error were bound by those pro-

ceedings whether they appeared therein or not, and whether they in fact knew of them or not.

State, ex. rel. Van Vleet v. *Wilson et al.*, 17 Wisconsin, 687, 691, 692.

Williams v. *Mitchell et al.*, 49 Wisconsin, 284.

State ex. rel. etc., v. *Nelson*, 57 Wisconsin, 147, 154.

Brock et al. v. *Hishen et al.*, 40 Wisconsin, 674, 679.

Bradley v. *Frankfort*, 99 Indiana, 417.

Burnham v. *Goffstown*, 50 N. H., 560.

In re Hill Town Road, 18 Pa. St. 233.

In re Road in Allen Township, 18 Pa. St. 463.

In some of the cases it is held that the fact that some of the commissioners were disqualified may be shown upon the trial of an appeal from the judgment of condemnation, provided it affirmatively appears that the fact was not discovered in time to have been presented to the lower court or tribunal.

No case can be found, we think, in which it has been held that such a question can be raised in a collateral proceeding, even upon showing that the fact did not come to the knowledge of the party raising the objection until after it was too late to raise it in the original proceeding. But this is immaterial, because, for the purposes of this case, we might safely concede that the Plaintiffs below were

at liberty to show by proof that they had no knowledge of the alleged incompetency of Wood, one of the commissioners; *for the record shows that they made no attempt to establish any such fact.* No proof upon the subject was offered. It did not appear, either, that the Plaintiffs below were in point of fact ignorant of the proceedings, or that while said proceedings were pending they were ignorant of the fact that Wood was not a freeholder. They allege in their replication that they were at the time of the proceedings, and have ever since been, residents and citizens of the State of Missouri and had no knowledge or information of said proceedings and were not present at the time, nor ever authorized any one to appear for them, nor in any manner consented to such proceedings. See statement by Plaintiffs in Error, page 14.

These allegations, however, were all under the statute of Kansas deemed to be controverted by the adverse party, as upon direct denial or avoidance. See compiled Laws of Kansas, 1885, Sec. (3927), page 621.

As no proof was offered in support of the allegation it cannot be claimed upon this hearing that the Plaintiffs in Error have shown, either that they had no knowledge of the proceedings or that they were not present at the time; much less can it be claimed that they have shown that they did not know the fact, while said proceedings were pending, that Wood was not a freeholder. There is certainly no presumption in their favor upon any of these

questions. The burden was upon them to establish their allegations by affirmative proof. The law presumes that they had notice of the proceedings, and the most that they can claim is, that, having notice and believing the proceedings to be void, they declined to appear before the commissioners or to take an appeal as they were authorized to do by law. Under such circumstances it is clear, under the authorities above cited, as well as upon well-settled principle, that they have waived the objection that one of the commissioners was not qualified

State ex rel. &c. v. *Wilson, supra*, was a case in which persons were appointed appraisers of damages sustained by the laying out of a road under a statute of Wisconsin, who were not freeholders. The objection was not raised in the course of the proceeding, but was attempted to be asserted collaterally in a proceeding for *mandamus* to compel the payment of the damages caused by the laying out of the road. The court said, page 691:

"Another ground relied on by the respondents to show that a peremptory writ should not be accorded to compel them to proceed and audit the amount of damages allowed the relator in consequence of laying out the highway over his land is, that it appears that the commissioners who assessed those damages were not all freeholders of the town of Aztalan, and therefore that their award was null and void."

And after quoting the statute the court proceeded, (page 692:)

"But suppose the supervisors, as they did here, neglect or fail to attend at the striking of the jury, and by inadvertence or mistake of the justice in preparing the list of names, persons are summoned to appraise the damages who are not freeholders. What is the consequence? Does such error or mistake vitiate the whole proceeding and render the award null and void? It seems to us not. Of course, it is the clear duty of the justice to exercise care and caution in making out the list, and endeavor in all cases to select only such persons as possess the proper statutory qualifications. Yet we know that the justice is liable to fall into a mistake upon this point from the nature of the duty to be performed. After the exercise of all reasonable care and diligence, he may place upon the list persons who are not freeholders. This is perhaps unavoidable. What is the result? Must the whole proceeding go for naught, and the award declared void?"

The court proceeds to show the distinction which exists between a case where the jury or the commissioners are selected merely to appraise damages which result from the laying out of a highway, and one where a petition is presented which constitutes the foundation of a proceeding to divest an owner of his estate.

"In the latter case" says the court, "the owner may well insist upon a strict compliance with the statute by the public authorities, in order to divest him of the use and enjoyment of his property. But after the land has been taken, and it becomes a question of damages, the matter is entirely different. Each party can then appear before the justice, and see that the persons selected to determine that question possess the statutory qualifications. And if they do not appear, and the justice, by mistake, selects a person not a freeholder of his town, this

fact alone ought not to render the award null and void."

The case of *Brock et al.* v. *Hishen et al, supra*, also presented the question as to the validity of proceedings of this character where one of the commissioners was disqualified, not being a disinterested person within the meaning of the statute prescribing the qualifications of such commissioners. The question, however, was raised in a collateral proceeding, and in considering it the court said:

"But we think the objection comes too late. It is not unlike the case where an incompetent juror is permitted to be sworn in a cause without an objection. Whether the fact be known or unknown to the defeated party, such incompetency is not ground for reversing the judgment. In some cases it is not even ground for a new trial. *State* v. *Vogel*, 22 Wis. 471."

The same question again arose in *Williams* v. *Mitchell et al., supra*, and was again discussed, the court among other things saying :

"Where the court reviewing the proceedings of the commissioners on *certiorari*, brought in proper time, it is very probable that their determination would be reversed, because the justice disregarded such objection and appointed commissioners who were not disinterested. But this is an irregularity only, and not jurisdictional. It was substantially so held in *Brock* v. *Hishen* ; for in that case the failure to object in due time to the competency of the late supervisor was held a waiver of the objection. Being merely an irregularity, it is not available in a collateral action. Although the commissioners were not disinterested, their determination is not therefore void, but is valid and conclusive until as-

sailed in a direct proceeding to set it aside. This is not such a proceeding; and therefore in this action it must be held that such determination is valid."

See also same effect, *State ex rel., etc.*, v. *Nelson, supra*, the remarks of Lyon. Judge, in delivering the opinion of the court, 57 Wisconsin, page 154.

In *Bradley* v. *Frankfort, supra*, the Supreme Court of Indiana, discussing a statute much like that of Kansas, said:

"When persons are served with notice of the * * * * * meeting of the commissioners, they are called upon to appear before them and protect their rights. If the notice does not serve this purpose and carry with it the right and duty to thus appear, it serves no purpose at all and had as well not be given * * * * . Having the right they ought to exercise it and thus prevent a useless proceeding and the accumulation of useless costs."

The court proceeds to hold that objections to the competency of commissioners must be made at the time of their appointment if the objecting party has knowledge that they are incompetent, and that if no such objection be made he must be deemed to have waived it and cannot make it on *appeal*. The case did not present the question as to whether want of knowledge at the time of the appointment would, if affirmatively shown, authorize the party to raise the question in a collateral action. It was held, that as appellant was served with notice and had not averred that he had no knowledge, at the

time of meeting, of any incompetency of commissioners, he could not raise the question on appeal.

In *Burnham* v. *Goffstown, supra*, it was held by the Supreme Court of New Hampshire that such objections must be made seasonably so that they may be obviated, and that after the verdict it is too late to take an exception that might have been taken earlier.

And *In re Hill Town Road, supra*, the Supreme Court of Pennsylvania said:

"Such an objection must be made at the earliest moment when, by the exercise of common diligence and observation, the fact might have been discovered. * * * * * * A man cannot reserve such an objection while he awaits the chance of a favorable report, and use it after he finds the report against him."

And again the same court said *In re Road in Allen Township, supra:*

"The parties interested are presumed to have notice of the time of meeting of the viewers; and the family connections of the viewers with the petitioners are matters which may be ascertained by diligent inquiry. It is therefore too late to make the objection after the report is made."

FOURTH PROPOSITION.

That the Statute of Kansas Respecting the Condemnation of Land for Railroad Purposes, Having been Repeatedly Approved by the Supreme Court of that State, and Having been for Many Years Upheld and Enforced, this Court would, for the Sake of Harmony and to Avoid Confusion, Even if the Question were Doubtful, Lean Towards an Agreement with the State Courts.

This proposition needs no argument to support it, but we take the liberty of quoting from the decision of this court in *Burgess* v. *Seligman*, 107 U. S., page 34, as follows:

"But even in such cases, for the sake of harmony and to avoid confusion, the Federal courts will lean towards an agreement of views with the State courts if the question seems to them balanced with doubt. Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considerd decisions of the State courts."

Respectfully submitted.

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